

## UNITED STATES V. WECHT: WHEN ANONYMOUS JURIES, THE RIGHT OF ACCESS, AND JUDICIAL DISCRETION COLLIDE

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### I. INTRODUCTION

The United States was a young country in 1807 when proceedings began in Aaron Burr's treason trial.<sup>1</sup> The former vice president sat accused of treason for allegedly conspiring to wage war against the United States.<sup>2</sup> By all accounts, the trial was such a spectacle that the country had not seen anything like it before, even during the colonial period. Although newspapers at the time virtually ignored the courts, the Burr trial "captivated the American public's attention," and the newspapers happily obliged the public's interest.<sup>3</sup> The news reports were so invasive and the editorials were so provocative that Burr alleged that the coverage prejudiced the jury against him.<sup>4</sup> Acknowledging that some jurors might have formed opinions, Chief Justice John Marshall, serving as the trial judge,<sup>5</sup> instructed the jury to re-

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<sup>1</sup> See *United States v. Burr*, 25 F. Cas. 2, 2 (C.C.D. Va. 1807).

<sup>2</sup> See CHARLES F. HOBSON, *THE AARON BURR TREASON TRIAL* 2 (2006), [http://www.fjc.gov/history/burr.nsf/page/burr\\_pdf/\\$file/BurrTrial\(final\).pdf](http://www.fjc.gov/history/burr.nsf/page/burr_pdf/$file/BurrTrial(final).pdf).

<sup>3</sup> *Id.* at 34.

<sup>4</sup> See COMM. ON THE OPERATION OF THE JURY SYS., REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM ON THE "FREE PRESS-FAIR TRIAL" ISSUE, 45 F.R.D. 391, 394 n.2 (1968) [hereinafter *FREE PRESS-FAIR TRIAL REPORT*].

<sup>5</sup> Burr's trial took place in the U.S. Circuit Court for the District of Virginia because it had original jurisdiction. See *Burr*, 25 F. Cas. at 2. In the early nineteenth century, the circuit courts lacked their own judges, which meant that one Justice from the Supreme Court of the United States and one district court judge from the circuit sat on the circuit court. See HOBSON, *supra* note 2, at 9. Thus, Chief Justice Marshall, as the Supreme Court Justice assigned to the Circuit Court for the District of Virginia, presided over Burr's trial as the trial judge. See *id.*

main open to the evidence and witness testimony.<sup>6</sup> Despite the prejudicial media coverage, the jury acquitted Burr of treason.<sup>7</sup>

Since 1807, courts have occasionally witnessed high public interest in criminal trials.<sup>8</sup> In the early 1920s, the newspapers and public carefully followed the Sacco and Vanzetti arrests and murder trial.<sup>9</sup> The media coverage continued throughout the defendants' appeals and right up to their execution.<sup>10</sup> Reporters even tracked down the original jurors from the trial—seven years after the guilty verdicts—to ask whether, in hindsight, they thought that the trial was fair.<sup>11</sup> The intensity and pervasiveness of the media's trial coverage, however, took on a new character in the 1950s<sup>12</sup> with the advent of television and the growth of broadcast news.<sup>13</sup>

The justice system witnessed one of the first modern media frenzies in the 1954 murder trial of Dr. Samuel Sheppard.<sup>14</sup> The prosecution accused Dr. Sheppard, a "handsome, 30-year-old" doctor from an

<sup>6</sup> See 1 DAVID ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR 415 (Philadelphia, Hopkins & Earle 1808).

<sup>7</sup> See HOBSON, *supra* note 2, at 11–12.

<sup>8</sup> See ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, AM. BAR ASS'N, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS 21 (1968) (noting that the intertwining of the justice system and media coverage "has not suddenly descended upon us as a result of the rapid growth of communications in the twentieth century").

<sup>9</sup> See, e.g., Louis Stark, *Are Sacco and Vanzetti Guilty?*, N.Y. TIMES, Mar. 5, 1922, at 3. The Commonwealth of Massachusetts convicted Nicola Sacco and Bartolomeo Vanzetti for murdering a paymaster and a security guard during the course of a payroll robbery. See *id.* The trial was highly politicized because Sacco and Vanzetti were members of an Italian-American anarchist group connected to the Red Scare. See *id.* at 3, 14.

<sup>10</sup> See generally Commonwealth v. Sacco, 158 N.E. 167 (Mass. 1927) (recounting and denying the defendants' challenges to their trial's fairness); *Sacco Jurors Still Think Trial Fair*, N.Y. TIMES, Apr. 19, 1927, at 28.

<sup>11</sup> See *Sacco Jurors Still Think Trial Fair*, *supra* note 10.

<sup>12</sup> See Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (recognizing the "pervasiveness of modern communications"); see also ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, *supra* note 8, at 21–22 (noting that the "wider distribution of information" makes the interaction between the criminal-justice system and the media more problematic).

<sup>13</sup> See generally SIG MICKELSON, THE DECADE THAT SHAPED TELEVISION NEWS: CBS IN THE 1950S (1998); see also Kimba M. Wood, *Re-Examining the Access Doctrine*, COMM. LAW., Winter 1994, at 3, 4 (noting that "there was far less concern about the effect of pretrial publicity 200 years ago and little or no cause for concern about the juror's privacy interests").

<sup>14</sup> See *Sheppard*, 384 U.S. at 358.

Ohio suburb, of brutally murdering his pregnant, thirty-one-year-old wife.<sup>15</sup> The press's daily trial coverage included

[a]bout fifty reporters from newspapers, news services, radio and television networks, with perhaps twenty still and movie camera men . . . swarmed over the court house.

Except [for] eight or ten seats in the last row, all places in the court room not occupied by participants and attendants [were] filled by the press.<sup>16</sup>

Not only were critics concerned about the fairness of the process to Dr. Sheppard, the trial also raised serious questions about the privacy of jurors because of the pervasive media coverage.<sup>17</sup>

During the years following the Sheppard trial and Dr. Sheppard's appeal to the Supreme Court of the United States in *Sheppard v. Maxwell*,<sup>18</sup> the legal community recognized the need to address how the media covers high-profile trials and the negative influence excessive media coverage can have on the trial itself.<sup>19</sup> Congress also em-

<sup>15</sup> Ira Henry Freeman, *Sheppard's Trial Interests Nation*, N.Y. TIMES, Oct. 31, 1954, at 83.

<sup>16</sup> *Id.* In contrast, the 1966 retrial of Dr. Sheppard saw the trial judge implement more stringent courtroom controls on the media, the lack of which was the Supreme Court's main criticism of the trial judge in the first trial. See *Sheppard*, 384 U.S. at 358-63; *Press Rules Set in Sheppard Trial*, N.Y. TIMES, Oct. 20, 1966, at 1 (The judge "barred cameras, sound recording devices and stenographic machines from the courthouse during the trial or related proceedings and at any recess or adjournment. He also banned the installation of teletype machines or special telephones. He said there would be 14 seats reserved for the press.").

<sup>17</sup> See *Sheppard*, 384 U.S. at 353 (observing that the media and public subjected the jurors to intense scrutiny, which included the jurors seeing their pictures in the news and receiving letters from unknown persons concerning the trial).

<sup>18</sup> *Id.* at 353.

<sup>19</sup> See generally ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, *supra* note 8; FREE PRESS-FAIR TRIAL REPORT, *supra* note 4; THE SPECIAL COMM. ON RADIO, TELEVISION, AND THE ADMIN. OF JUSTICE, THE ASS'N OF THE BAR OF THE CITY OF N.Y., FREEDOM OF THE PRESS AND FAIR TRIAL (1967); TASK FORCE ON JUSTICE, THE TWENTIETH CENTURY FUND, PUBLICITY, AND THE FIRST AMENDMENT, RIGHTS IN CONFLICT (1976). Aside from *Sheppard*, a number of other cases spurred the legal community to address how the media covers trials. See *Estes v. Texas*, 381 U.S. 532, 550-52 (1965) (describing how the publicity of the defendant's pretrial hearing violated his Sixth Amendment rights); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (asserting that the "spectacle" of the defendant confessing to the police on a local television station was the defendant's trial for any member of the juror pool who watched it); *Irvin v. Dowd*, 366 U.S. 717, 725-29 (1961) (describing how the publicity surrounding the trial made it impossible to find an impartial jury); *Marshall v. United States*, 360 U.S. 310, 311-13 (1959) (describing how news articles, which discussed the defendant's prior convictions, read by the jurors during trial had to have prejudiced the jury because this information was previously excluded by the trial judge as too prejudicial to the defendant).

braced the idea of greater judicial discretion and control over criminal proceedings.<sup>20</sup> As a result, district courts have relied on case law, statutes, and their inherent judicial authority to address intense media coverage, including withholding jurors' identities from the public by using anonymous juries.<sup>21</sup> In contrast, because of the media's First

<sup>20</sup> See 28 U.S.C. § 1863(b)(7) (2006). The primary impetus behind the Jury Selection and Service Act of 1968 was the Civil Rights Movement. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 100 (1994) (stating that by moving to a cross-sectional jury system, Congress aimed "to strip away [racial] discrimination," and as a result, the jury could "achieve . . . [an] impartiality that comes from balancing the biases of its members against each other"). Nonetheless, Congress did not adopt all of the 1968 provisions with the Civil Rights Movement in mind. For example, the legislative history indicates that Congress adopted 28 U.S.C. § 1863(b)(7) to permit the current practices in the various federal district courts to persist. See H.R. REP. NO. 90-1076, at 11 (1968), as reprinted in 1968 U.S.C.C.A.N. 1792, 1801. Given that 28 U.S.C. § 1863(b)(7) dealt with when to publicize juror names, Congress's determination had to go beyond considerations based solely on racial discrimination and include the media's role in the courtroom, which Congress decided the local district courts were in the best position to handle. See *id.* In this sense, it appears that Congress concurred with the Supreme Court when it recognized the need for greater control of the courtroom by trial judges in light of excessive media coverage. See *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) ("[U]nfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . [T]he cure lies in those remedial measures that will prevent the prejudice at its inception.").

<sup>21</sup> See *United States v. Brown*, 250 F.3d 907, 914 (5th Cir. 2001); *United States v. DeLuca*, 137 F.3d 24, 31 (1st Cir. 1998); *In re Globe Newspaper Co.*, 920 F.2d 88, 91-93 (1st Cir. 1990); *United States v. Mohammed*, 538 F. Supp. 2d 281, 282-83 (D.D.C. 2008); *United States v. Black*, 483 F. Supp. 2d 618, 625-26 (N.D. Ill. 2007). In the past, courts have also imposed gag orders on the press or participants in the case. See *Sheppard v. Maxwell*, 384 U.S. 333, 359 (1966) (suggesting that the trial judge could have imposed a gag order on trial participants as it related to the release of prejudicial information); see also *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (upholding the sanctioning of an attorney for the attorney's prejudicial statements about a pending case). Compare *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (holding that gag orders on the press are presumptively unconstitutional), with *United States v. Noriega*, 917 F.2d 1543, 1551-52 (11th Cir. 1990) (permitting a narrowly tailored gag order to prevent the press from airing the private discussions of the defendant and the defendant's lawyers). In narrow circumstances, courts may close trial proceedings. See *infra* Part II.C. Even if the courts may not close trial proceedings, they may still limit the media's presence in the courtroom. See generally *Sheppard*, 384 U.S. 333. Last, the court may sequester the trial jurors. See, e.g., *id.* at 352-53, 363 (noting that one of the problems in Dr. Sheppard's trial was that the judge failed to even raise "sequestration of the jury . . . *sua sponte* with counsel" despite the media subjecting the jurors "to [the same] newspaper, radio and television coverage . . . [as] the trial [itself, even] while not taking part in the proceedings").

Amendment right of access and the inherent benefits of public trials and media scrutiny, the Supreme Court has voiced concern over excessive judicial measures that close proceedings from the public eye.<sup>22</sup> For these reasons, in 1986, the Supreme Court adopted the “experience and logic” test.<sup>23</sup> The “experience and logic” test seeks a balance between too much and too little public access under the First Amendment by instructing courts when proceedings must be open or may be closed.<sup>24</sup>

Courts determine whether the “experience and logic” test weighs in favor of a First Amendment right of access by examining both the historical openness of the proceeding and the benefits and detriments of public access.<sup>25</sup> If a First Amendment right attaches, then a presumption of openness applies.<sup>26</sup> A court can close a proceeding and overcome this presumption only when detailed, case-specific findings reveal the necessity of closure.<sup>27</sup> On the other hand, when the First Amendment does not attach, the courts need not overcome a constitutional burden to close the proceedings.<sup>28</sup> Thus, courts have far greater discretion and control over the trial process

<sup>22</sup> See, e.g., *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 7 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577–80 (1980).

<sup>23</sup> *Press-Enterprise II*, 478 U.S. at 9.

<sup>24</sup> Compare *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (holding that the First Amendment right of access attaches to plea hearings), with *United States v. Cojab*, 996 F.2d 1404, 1405 (2d Cir. 1993) (holding that the First Amendment right of access does not attach to all pretrial hearings).

<sup>25</sup> *Press-Enterprise II*, 478 U.S. at 8–9.

<sup>26</sup> See *id.* at 9.

<sup>27</sup> See *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984).

<sup>28</sup> Compare *id.* (holding that a district court judge, to close a proceeding under the First Amendment, must base closure on specific findings that show (1) the existence of an “overriding interest”—any interest that “is essential to preserve higher values” than the value of openness—and (2) that closure is “narrowly tailored to serve that interest”), with *Nixon v. Warner Commc’n, Inc.*, 435 U.S. 589, 599 (1978) (stating that appellate courts should review a district court judge’s denial of access to judicial records under the common-law right of access only for abuse of discretion), and *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (“Under common law, there is a presumption of access accorded to judicial records. This presumption of access, however, can be rebutted if countervailing interests heavily outweigh the public interests in access. The trial court may weigh ‘the interests advanced by the parties in light of the public interests and the duty of the courts.’ The party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption.”) (internal citations omitted).

when a First Amendment right does not attach because they do not need to overcome a constitutional presumption of openness.<sup>29</sup>

The “experience and logic” test and the stability it achieves have worked well, but the U.S. Court of Appeals for the Third Circuit upset the status quo in *United States v. Wecht* (*Wecht II*).<sup>30</sup> In *Wecht II*, the Third Circuit held that the media has a First Amendment right of access to the names and addresses of prospective jurors.<sup>31</sup> Yet legal tradition and policy considerations weigh against the Third Circuit’s holding under the “experience and logic” test.

If *Wecht II* endures, district judges will lose a significant amount of discretion over the jury-selection process and will no longer control when or how the court releases prospective jurors’ identities to the public in high-profile trials. Instead of using their inherent and statutory discretion, courts would first need to rebut a strong, constitutional presumption—rather than a common-law presumption—that the jurors’ identities are publicly available. By making it more difficult for the district courts to exercise their discretion during jury selection, *Wecht II* ignores the history that led to the “experience and logic” test and the delicate policy balance that the Supreme Court and Congress achieved.

This Comment contends that, under the “experience and logic” test, the First Amendment does not apply to *prospective* jurors’ identities during jury selection.<sup>32</sup> Therefore, the First Amendment does not require that courts disclose prospective jurors’ identities to the public when the parties have not finished jury selection in a high-profile case that lacks safety concerns. Part II of this Comment introduces the concept of the anonymous jury and the source of the district judge’s authority to empanel an anonymous jury. Part II also presents the constitutional issues raised by an anonymous jury and the current case law addressing those issues. Part III discusses the unprecedented decision in *Wecht II*, which creates a constitutional

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<sup>29</sup> See *Rushford*, 846 F.2d at 253 (“The common law [right of access] does not afford as much substantive protection to the interests of the press and the public as does the First Amendment [right of access].”).

<sup>30</sup> 537 F.3d 222 (3d Cir. 2008).

<sup>31</sup> See generally *id.*

<sup>32</sup> This Comment does not address the following issues: (1) whether *prospective* jurors’ identities should be withheld from the public beyond empanelment; (2) whether *prospective* jurors’ identities should be anonymous to the *parties*, rather than the *public*, when the trial does not raise safety concerns; and (3) whether *actual trial* jurors’ identities should be anonymous in high-profile trials that do not raise safety concerns.

right to obtain the identities of prospective jurors. Part IV analyzes the ways in which the *Wecht II* court misapplied the “experience and logic” test. Part IV also evaluates the potential effects of *Wecht II* and how, if followed, it might substantially affect the balance achieved between media-access concerns and concerns for juror privacy and systemic integrity.

## II. BACKGROUND ON ANONYMOUS JURIES AND COMMON CONSTITUTIONAL CHALLENGES

### A. *The History and Development of Anonymous Juries*<sup>33</sup>

A jury is anonymous when all information regarding the jurors is public, such as their ethnicity, age, level of education, and other background information, with the exception of the jurors’ identities.<sup>34</sup> In the past, courts have hidden the identity of jurors from both the defendant and the public<sup>35</sup> or only from the public.<sup>36</sup> Courts also vary the duration of a jury’s anonymity, releasing the jurors’ names before empanelment, after empanelment, or not at all.<sup>37</sup> Additionally, courts diverge on the amount of information to withhold to keep the jury anonymous. For example, while courts sometimes withhold only the names and addresses, other times courts also withhold the

<sup>33</sup> Courts occasionally use the term “innominate” jury. *See, e.g.,* United States v. Bowman, 302 F.3d 1228, 1236 (11th Cir. 2002) (noting that “innominate” is the appropriate label when the “parties knew everything about the jurors except their [last] names”). Although the use of the term “anonymous” jury seems appropriate when nothing is known about the jurors because the term summons images of a “clandestine, forbidden, and obscure” venire, the term “anonymous” is more commonly utilized and is the term used in this Comment. United States v. Carpa, 271 F.3d 962, 963 n.1 (11th Cir. 2001).

<sup>34</sup> A juror’s identity consists of both the juror’s name and address. *See In re Globe Newspaper Co.*, 920 F.2d 88, 93 n.6 (1st Cir. 1990) (“In the case of many familiar names, an address as well as the name is necessary to identify the individual.”).

<sup>35</sup> *See, e.g.,* United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994) (upholding use of jury that was anonymous to the defendant and the public).

<sup>36</sup> *See, e.g.,* United States v. Black, 483 F. Supp. 2d 618, 622–30 (N.D. Ill. 2007) (upholding use of anonymous jury where the defendant argued for closure and the media argued in favor of public access).

<sup>37</sup> *See, e.g.,* United States v. Brown, 250 F.3d 907, 910 (5th Cir. 2001) (upholding use of anonymous jury and denial of media’s request for juror identities post-verdict); United States v. Doherty, 675 F. Supp. 719, 725 (D. Mass. 1987) (permitting the withholding of the jurors’ names from the public for seven days after the verdict was handed down, to adequately protect the jurors’ privacy).

place of employment, ethnicity, or religion.<sup>38</sup> This Comment deals with anonymous juries in federal criminal trials where the district court withholds the names and addresses of prospective jurors from the public prior to empanelment but discloses the names and addresses to the parties.

Many scholars consider *United States v. Barnes* to be the first example of a court upholding the use of an anonymous jury after the court empaneled and swore in the trial jurors.<sup>39</sup> While *Barnes* might be the first case in which a court used an anonymous jury throughout the entire trial, the case law suggests that the Supreme Court and Congress permitted district courts to deny defendants the jurors' names and addresses through the empanelment stage of trial before the 1970s.<sup>40</sup> By extension, the Supreme Court and Congress must have permitted the district courts to withhold the jurors' identities from the public as well. Logistically, it is difficult to foresee how a court could withhold the jurors' identities from the defendant while making the jurors' identities available to the public.

In *Hamer v. United States*,<sup>41</sup> the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision to deny the defendant the list of prospective jurors, which contained the prospective jurors' names and addresses, during voir dire.<sup>42</sup> The court relied

<sup>38</sup> See, e.g., *United States v. Paccione*, 949 F.2d 1183, 1191–92 (2d Cir. 1991) (upholding district court's order to withhold jurors' names, addresses, and places of employment); *United States v. Barnes*, 604 F.2d 121, 140–43 (2d Cir. 1979) (upholding anonymous jury where district court withheld jurors' names, addresses, religion, and ethnicity); *United States v. Melendez*, 743 F. Supp. 134, 138–39 (E.D.N.Y. 1990) (permitting the withholding of jurors' first names, specific addresses, and places of employment but allowing disclosure of jurors' last names, general area of residence, and types of employment).

<sup>39</sup> See *Barnes*, 604 F.2d at 140–41; see, e.g., Abraham Abramovsky & Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 ST. JOHN'S J. LEGAL COMMENT. 457, 457 (1999) (noting that *Barnes* was “the first fully anonymous jury in American History”). In this case, the defendant stood accused of a number of serious drug distribution charges, and in New York, such defendants had a well-documented “history of attempts at influencing witnesses and jurors.” *Barnes*, 604 F.2d at 134 & n.3. As a result, the court withheld the trial jurors' names and addresses from the public and both parties for the entire trial out of a concern for juror safety rather than a concern over the biases that might result from excessive media coverage. See *id.* at 140–41.

<sup>40</sup> See *infra* notes 41–64 and accompanying text.

<sup>41</sup> 259 F.2d 274 (9th Cir. 1958).

<sup>42</sup> See *id.* at 277–79. The Ninth Circuit also permitted the district judge to prevent defendant's counsel from asking for the prospective jurors' names and addresses during voir dire. See *id.*



upon *Pointer v. United States*,<sup>43</sup> in which Supreme Court Justice John Marshall Harlan, writing for the majority, stated,

[T]he mode of designating and impaneling jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions congress [sic] has prescribed, and also to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses.<sup>44</sup>

The *Hamer* court observed that Congress only required that the defendant receive a list of prospective jurors in trials for treason and other capital offenses.<sup>45</sup> Given that the government indicted the defendant for a noncapital offense, the court held that the jury could remain anonymous to the defendant through empanelment.<sup>46</sup> Moreover, if the defendant did not have a right to know the jurors' identities, then the public, by extension, must not have had a right to this information either.

The Ninth Circuit was hardly the first court to hold that district judges had the discretion to keep prospective jurors anonymous by withholding lists of prospective jurors from defendants in noncapital cases.<sup>47</sup> In 1891 in *United States v. Van Duzee*, the Supreme Court recognized that persons indicted for noncapital offenses were not "entitled to a list of . . . jurors."<sup>48</sup> Even as far back as 1818, the Circuit Court for the Eastern District of Pennsylvania only required the delivery of prospective-juror lists in cases of treason and other capital offenses and held that the right to juror lists did not extend to nonca-

<sup>43</sup> 151 U.S. 396 (1894); see *Hamer*, 259 F.2d at 278.

<sup>44</sup> *Pointer*, 151 U.S. at 407–08.

<sup>45</sup> See *Hamer*, 259 F.2d at 278. The court referenced 18 U.S.C. § 3432, which was amended in 1994 to include an exception, even in the case of treason and other capital offenses, "if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60025, 108 Stat. 1982 (codified at 18 U.S.C. § 3432 (2006)).

<sup>46</sup> See *Hamer*, 259 F.2d at 276–79.

<sup>47</sup> See, e.g., *Wilson v. United States*, 104 F.2d 81, 82 (5th Cir. 1939) (upholding the trial judge's order forbidding the clerk from distributing the jury list to anyone other than the marshal before the first day of trial and, even then, indicating that distribution on the first day of trial is within the "sound discretion of the trial court"); see also *Stone v. United States*, 324 F.2d 804, 807 (5th Cir. 1963) (affirming *Wilson*); *Spivey v. United States*, 109 F.2d 181, 185–86 (5th Cir. 1940) (affirming *Wilson*).

<sup>48</sup> 140 U.S. 169, 173 (1891).

pital offenses.<sup>49</sup> In fact, district judges had the authority to deny juror lists to defendants in all noncapital cases since 1790 because Congress only gave defendants the right to a juror list in capital cases.<sup>50</sup>

While *Barnes* was the first case to use an anonymous jury for the entire trial, the modern trend of empanelling anonymous juries, which *Barnes* represents, has strong roots in the concerns that the Supreme Court raised to the intense media coverage surrounding the trial of Dr. Sheppard in 1954. Unlike the prior case law, *Sheppard* shifted the conflict from one between the trial court and the defendant's right to juror lists before empanelment to a conflict between the trial court and the media's right to jurors' identities before empanelment, after empanelment, and post-trial.<sup>51</sup>

In *Sheppard*, the local authorities arrested the defendant, Dr. Sheppard, for murdering his wife.<sup>52</sup> Although Dr. Sheppard maintained his innocence, the press vilified him both before and during the trial.<sup>53</sup> The Supreme Court characterized the atmosphere of the trial as that of a "carnival."<sup>54</sup> Although the Supreme Court recognized

<sup>49</sup> See *United States v. Wood*, 28 F.Cas. 754, 755 (C.C.E.D. Pa. 1818); see also *Van Duzee*, 140 U.S. at 173 (citing *Wood* with approval).

<sup>50</sup> See Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118 ("[A]ny person who shall be accused and indicted of treason, shall have . . . a list of the jury and witnesses . . . mentioning the names and places of abode of such witnesses and jurors, delivered unto him at least three entire days before he shall be tried for the same; and in other capital offences, shall have such copy of the indictment and list of the jury two entire days at least before the trial."). Although not the topic of this Comment, one wonders whether there was ever a common-law right to prospective-juror lists before empanelment given that Congress thought it was necessary to enact a statute creating this right in trials for treason and other capital offenses.

<sup>51</sup> This Comment focuses exclusively on the use of an anonymous jury up until empanelment. Consequently, this Comment primarily discusses the media's right of access to *prospective* juror identities *prior* to the trial judge swearing in the actual trial jurors.

<sup>52</sup> See *Sheppard v. Maxwell*, 384 U.S. 333, 336, 341 (1966).

<sup>53</sup> See *id.* at 338–49.

<sup>54</sup> *Id.* at 358. The "totality of the circumstances" were suggestive of the inherent unfairness of the trial. *Id.* at 352–53. The jurors

were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways . . . without adequate directions not to read or listen to anything concerning the case . . . . The numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself exposed them to expressions of opinion from both cranks and friends. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy.

that a “responsible press” is the “handmaiden of effective judicial administration,”<sup>55</sup> the Court also asserted that trial judges must address the “pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors.”<sup>56</sup> Moreover, the Court insisted that trial judges have the power to protect against prejudicial publicity.<sup>57</sup>

In 1968, Congress passed the Jury Selection and Service Act of 1968.<sup>58</sup> Partially in response to *Sheppard*,<sup>59</sup> Congress authorized each district court to adopt a jury-selection plan that would determine when the district judges must release the prospective jurors’ names to the parties and the public.<sup>60</sup> Congress, however, did not require that each district court make the prospective jurors’ names public.<sup>61</sup> In fact, Congress intended that the statute—28 U.S.C. § 1863(b)(7)—codify the various existing practices in the country’s district courts.<sup>62</sup>

*Id.* at 353. “In light of this background . . . the arrangements made by the judge with the news media caused Sheppard to be deprived of that ‘judicial serenity and calm to which (he) was entitled.’” *Id.* at 355 (internal citation omitted).

<sup>55</sup> *Id.* at 350 (“A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”).

<sup>56</sup> *Id.* at 362.

<sup>57</sup> *See id.* at 357–63 (noting a number of options that the trial judge had at his disposal to reign in the excessive media coverage).

<sup>58</sup> Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. §§ 1861–1869 (2006)).

<sup>59</sup> *See* United States v. Wecht (*Wecht II*), 537 F.3d 222, 252–53 (3d Cir. 2008) (Van Antwerpen, J., dissenting) (citing *In re Globe Newspaper Co.*, 920 F.2d at 92 (quoting H.R. REP. NO. 90-1076, at 11 (1968), as reprinted in 1968 U.S.C.C.A.N. 1792, 1801)); *see supra* note 20 and accompanying text.

<sup>60</sup> *See* § 1863(b)(7) (The “plan shall . . . fix the time when the names drawn from the qualified jury wheel shall be disclosed to [the] parties and to the public”).

<sup>61</sup> *See id.* (“If the plan permits these names to be made public.” (emphasis added)).

<sup>62</sup> *See id.*; *see also* H.R. REP. NO. 90-1076, at 11 (“It thereby permits the present diversity of practice to continue.”). Since 1790, Congress required a particular procedure for disclosing jurors’ identities to defendants in capital cases. *See* Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118; *see also* 18 U.S.C. § 3432 (2006). Congress, however, did not specify when or if the public was entitled to such information in capital cases, and it did not specify anything with respect to noncapital cases. In these circumstances, each district developed its own practice. For example, the Ninth Circuit, instead of creating a set procedure for releasing jurors’ identities to the public, put the decision in the hands of the district courts, which acted according to the trial judge’s discretion. *See* Hamer v. United States, 259 F.2d 274, 278–80 (9th Cir. 1958)

Additionally, even if the plan adopted by the district court required the district judges to release prospective jurors' names, Congress authorized the district judges to "keep these names confidential *in any case where the interests of justice so require*."<sup>63</sup> Thus, when modern-day courts exercise their authority to empanel an anonymous jury, they rely on 28 U.S.C. § 1863(b)(7).<sup>64</sup>

District courts aim to promote the use of public trials and thus are unlikely to use anonymous juries with any regularity.<sup>65</sup> Nonetheless, when determining whether to withhold jurors' identities, district courts look to any number of factors, including "(1) the defendant's involvement in organized crime; (2) the defendant's participation in a group with the capacity to harm jurors; (3) the defendant's past attempts to interfere with the judicial process; (4) the fact that the defendant faces a lengthy prison term or substantial fine; and (5) extensive media publicity."<sup>66</sup> If these factors weigh in favor of anonymity, the district court will exercise its discretion by empaneling an anonymous jury.

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(holding that congressional purpose and intent indicates that the courts are not required to release jurors' names and addresses to the defendant before trials for "lesser offenses"); *see also* *Wagner v. United States*, 264 F.2d 524, 527–30 (9th Cir. 1959) (affirming *Hamer* in holding that the defendant was not entitled to the names and addresses of prospective jurors where the statutes and Constitution do not provide such a right).

<sup>63</sup> 28 U.S.C. § 1863(b)(7) (2006) (emphasis added). The statute does not specify up until what point in the trial courts may keep the names confidential. Presumably, Congress intended that the courts interpret this timeframe's length. First, Congress codified existing practices, which suggests that Congress was permitting the practices already authorized by the courts. Second, the statute permits the withholding of identities if justice so requires, which suggests that the courts make this determination on a case-by-case basis.

<sup>64</sup> Unlike 18 U.S.C. § 3432, 28 U.S.C. § 1863 bestows district judges with the right to withhold jurors' identities. *Compare* 18 U.S.C. § 3432, *with* § 1863(b)(7). The courts' power under § 3432 is implied, rather than express, because § 3432 expressly grants defendants the right to juror lists only in trials for treason and other capital offenses. *See* § 3432. For example, the district court judge in *United States v. Wecht* empaneled an anonymous jury in reliance on his authority under § 1863(b)(7) and without relying on the failure of § 3432 to grant the right to a jury list to the defendant. *United States v. Wecht*, No. 2:06-cr-00026-AJS (W.D. Penn. Dec. 21, 2007) (order requiring empanelment of anonymous jury).

<sup>65</sup> *See* AM. JURY PROJECT, AM. BAR ASS'N, ABA PRINCIPLES FOR JURIES AND JURY TRIALS (AND COMMENTARY) 88 (2005), *available at* [http://www.abanet.org/juryprojectstandards/The\\_ABA\\_Principles\\_for\\_Juries\\_and\\_Jury\\_Trials.pdf](http://www.abanet.org/juryprojectstandards/The_ABA_Principles_for_Juries_and_Jury_Trials.pdf) (suggesting that open proceedings educate the public and instill confidence in the judiciary, which is in the interests of the courts not to erode, and anonymous juries thus should not be used absent "a genuine problem in a particular case").

<sup>66</sup> *Id.* at 87.

*B. Sixth Amendment Challenges to Anonymous Juries*

Both defendants and the media may raise constitutional challenges to anonymous juries in criminal trials. Defendants mount their challenges based on the Sixth Amendment “right to a speedy and public trial, by an impartial jury.”<sup>67</sup> As a result, defendants usually raise two arguments: (1) an anonymous jury violates the right to a public trial,<sup>68</sup> and (2) an anonymous jury violates the guarantee of an impartial jury.<sup>69</sup> Although controversies regarding defendant challenges under the Sixth Amendment are by no means settled issues,<sup>70</sup> the less-settled issues relate to the media’s right of access under the First Amendment.

<sup>67</sup> U.S. CONST. amend. VI. The Supreme Court has found that the Sixth Amendment guarantee to a public trial does not grant the media a right of access because the right to a public trial is for the benefit of the defendant, not the media. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 381 (1979). But some commentators have suggested that *Gannett* is ripe for reconsideration by the Supreme Court. See AKHIL REED AMAR, *THE BILL OF RIGHTS* 111–14 (1998) (“[E]ven if a defendant might prefer a closed proceeding (consider, for example, the British officers tried for their role in the Boston Massacre), the republican ideology underlying the public-trial clause [of the Sixth Amendment] overrode that preference in the name of democratic openness and education, public confidence, anticorruption, and truth seeking.”).

<sup>68</sup> See, e.g., *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (stating that the public trial ensures a fair trial and that the First and Sixth Amendments are equally protective of this right but that the public trial is mainly for the defendant’s protection). While a defendant may waive the right to a public trial, the Sixth Amendment does not guarantee a defendant the right to a closed trial. See *Singer v. United States*, 380 U.S. 24, 34–35 (1965). The defendant does not have a constitutional right to closure because the “right to an open public trial is . . . [the] right of the accused and the public,” which means that the First Amendment right of access may keep the trial open to the public when the defendant waives the Sixth Amendment right to a public trial. See *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 7 (1986).

<sup>69</sup> See, e.g., *United States v. Ross*, 33 F.3d 1507, 1519 (11th Cir. 1994) (“An anonymous jury raises the specter that the defendant is a dangerous person from whom jurors must be protected, thereby implicating the defendant’s constitutional right to a presumption of innocence.”). The defendant’s right to select a jury of the defendant’s choosing is another challenge to anonymous juries that relates to the guarantee of an impartial jury. See, e.g., *United States v. Gibbons*, 602 F.2d 1044, 1051–52 (2d Cir. 1979) (denying defendant’s argument that without the prospective jurors’ addresses the defendant could not properly use the peremptory challenge).

<sup>70</sup> The specific questions that are unsettled relate to whether this right of access extends to documents, evidence, and other information as opposed to the ability to attend and observe courtroom proceedings. See, e.g., *In re Nat’l Broad. Co.*, 828 F.2d 340 (6th Cir. 1987) (determining whether access extends to documents used to disqualify a judge from the case); *United States v. Eaves*, 685 F. Supp. 1243 (N.D. Ga. 1988) (determining whether access extends to recordings used as evidence); *United States v. Doherty*, 675 F. Supp. 719 (D. Mass. 1987) (determining whether access extends to jurors’ names and addresses after the verdict).

C. *First Amendment Challenges to Anonymous Juries*

The press enjoys certain rights under the First Amendment,<sup>71</sup> which include the right to attend criminal trials.<sup>72</sup> The media's right of access to the courtroom flows from its position as the proxy of the public.<sup>73</sup> The courtroom is "a public place," and historically, the public's attendance at trials has "enhance[d] the integrity and quality of what takes place."<sup>74</sup> Without this access, the essential rights to free speech and a free press "could be eviscerated."<sup>75</sup> Because of the importance of access, a rebuttable presumption of openness attaches to preliminary hearings<sup>76</sup> as well as to voir dire proceedings.<sup>77</sup>

Under *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, the Supreme Court requires courts to use a two-prong test—the "experience and logic" test—to determine whether the First Amendment's presumption of openness attaches to a proceeding.<sup>78</sup> Under the experience prong, the courts look to the history of the proceeding in issue to determine whether it has traditionally been open to the public.<sup>79</sup> The court, however, "does not look to the particular experience of any one jurisdiction, but instead 'to the experience in that type or kind of hearing throughout the United States.'"<sup>80</sup> The courts then examine the logic prong by evaluating whether public access will positively and "significant[ly]" affect the functioning of the proceeding.<sup>81</sup> If the two prongs weigh in favor of public access, then the First

<sup>71</sup> See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

<sup>72</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

<sup>73</sup> See *id.* at 577 n.12; see also *Gannett Co. v. DePasquale*, 443 U.S. 368, 397–98 (1979) (Powell, J., concurring) ("[T]his constitutional protection derives . . . because '[i]n seeking out the news the press . . . acts as an agent of the public at large . . .'" (internal citations omitted)).

<sup>74</sup> *Richmond Newspapers*, 448 U.S. at 578.

<sup>75</sup> *Id.* at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

<sup>76</sup> See *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 13 (1986).

<sup>77</sup> See *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510–13 (1984).

<sup>78</sup> 478 U.S. at 9.

<sup>79</sup> See *id.* at 8 (The experience prong asks "whether the place and process have historically been open to the press and general public.").

<sup>80</sup> *El Vocero de P. R. v. Puerto Rico*, 508 U.S. 147, 150 (1993) (internal citations omitted).

<sup>81</sup> *Press-Enterprise II*, 478 U.S. at 8 (The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process"); see *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 508 (1984).

Amendment protects that proceeding, which means a presumption of openness attaches.<sup>82</sup> Yet the presumption is not absolute.<sup>83</sup>

In *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, the Supreme Court indicated that an “overriding interest” could rebut the presumption of openness.<sup>84</sup> Without giving any examples, the Supreme Court defined an “overriding interest” as any interest that “is essential to preserve higher values” than the value of openness.<sup>85</sup> District courts must base closure on two specific findings—one showing the greater interest that closure will protect and a second showing that closure is “narrowly tailored to serve that interest.”<sup>86</sup> By making specific findings, the district court ensures that an appellate court can accurately review the closure order.<sup>87</sup>

### III. THE THIRD CIRCUIT’S APPROACH TO ANONYMOUS JURIES IN *UNITED STATES V. WECHT*

In *United States v. Wecht (Wecht II)*, the Third Circuit held that the media has a First Amendment right to the names and addresses of prospective jurors before voir dire even where the district judge ordered the empanelment of a jury that would be anonymous to the public but not to the defendant.<sup>88</sup>

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(noting that openness “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system”) (internal citation omitted); see also *United States v. Smith*, 787 F.2d 111, 114 (3d Cir. 1986) (listing “six societal interests in open court proceedings that the *Richmond Newspapers* Court had found: [1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the judicial process to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of perjury”).

<sup>82</sup> See *Press-Enterprise II*, 478 U.S. at 9.

<sup>83</sup> See *id.*; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

<sup>84</sup> 464 U.S. at 510; see also *Press-Enterprise II*, 478 U.S. at 9–10 (reaffirming the rule on rebutting the presumption of openness set forth in *Press-Enterprise I*).

<sup>85</sup> *Press-Enterprise I*, 464 U.S. at 510.

<sup>86</sup> *Id.*

<sup>87</sup> See *id.*; see also *Globe Newspaper Co.*, 457 U.S. at 606–07 (“Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”).

<sup>88</sup> See generally 537 F.3d 222 (3d Cir. 2008). Although the court says that the First Amendment right of access to jurors’ names and addresses attaches no later than empanelment, the court’s opinion implies that this right attaches much earlier, even

The U.S. Department of Justice brought corruption charges<sup>89</sup> against Dr. Cyril H. Wecht in January 2006 for unlawfully using “his public office as coroner of Allegheny County, Pennsylvania, for private financial gain.”<sup>90</sup> The media took an immediate interest in Dr. Wecht’s case because he is a controversial forensics consultant and because he was charged in the 1970s with using the Allegheny County morgue for personal gain.<sup>91</sup>

The parties agreed to use a twenty-four-page questionnaire with sixty-nine questions in the voir dire process in 2006 for the first scheduled trial.<sup>92</sup> By the time the court mailed the questionnaires “to 300 prospective jurors” in July 2006, the parties had also agreed that each prospective juror would return the completed questionnaire to the Jury Administrator.<sup>93</sup> Under the jury-selection procedure, the Jury Administrator would distribute the questionnaire to the court and parties once the Jury Administrator removed and retained the last page of the questionnaire, which contained only “[t]he juror’s full name, home address, and signature.”<sup>94</sup> As a result, the identity of the

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before voir dire. The court was willing to give the Media-Intervenors access to the identity of the prospective jurors such that “the prospective jurors will not be anonymous” and “the Media-Intervenors will have . . . information to investigate and detect possible improper bias in ‘for cause’ determinations.” *Id.* at 243. Yet “for cause” determinations occur during voir dire, which takes place prior to empanelment. The Media-Intervenors cannot possibly investigate the prospective jurors’ names during voir dire if the Third Circuit only requires disclosure at empanelment. Therefore, it appears that the Third Circuit believes that the right of access attaches, at the very least, during voir dire, if not earlier.

<sup>89</sup> The Department of Justice filed the case in the U.S. District Court for the Western District of Pennsylvania. *See id.* at 224. Judge Arthur Schwab was the presiding judge. *See id.*

<sup>90</sup> *Id.* at 224 (internal citations omitted).

<sup>91</sup> *See* Charlie Deitch, *The Wecht Files*, PITTSBURGH CITY PAPER, Dec. 20, 2007, available at <http://www.pittsburghcitypaper.ws/gyrobase/Content?oid=oid%3A39852> (explaining that Dr. Wecht is known for having challenged the Warren Commission on whether Lee Harvey Oswald was really a lone gunman, claimed on 20/20 that Elvis Presley died from a drug overdose and not a heart problem, and asserted in a tabloid that Jon Benet Ramsey died accidentally at the hands of her father). For more on the celebrity status of Dr. Wecht, *see Famed Forensic Witness Fights Fraud Charges*, USA TODAY, Dec. 19, 2007, [http://www.usatoday.com/news/nation/2007-12-19-celebrity-pathologist\\_N.htm](http://www.usatoday.com/news/nation/2007-12-19-celebrity-pathologist_N.htm); Dennis Roddy, *Dr. Wecht’s Silent Treatment*, PITTSBURGH POST-GAZETTE, Feb. 12, 2006, available at <http://www.post-gazette.com/pg/06043/653778-156.stm>.

<sup>92</sup> *See* United States v. Wecht, No. 2:06-cr-00026-AJS (W.D. Penn. Dec. 21, 2007) (order requiring empanelment of anonymous jury).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* The last page of the questionnaire was the only page that contained the individual juror’s name and address. *Id.*



jury pool would remain anonymous to all except the Jury Administrator. Neither the parties nor the media objected to this procedure.<sup>95</sup>

Although the first scheduled trial never took place,<sup>96</sup> Judge Schwab adopted virtually the same jury-selection procedure *sua sponte* in November 2007 for the second scheduled trial.<sup>97</sup> Instead of mailing the questionnaires to the prospective jurors, Judge Schwab ordered that the Jury Administrator issue summonses to four hundred prospective jurors whereby prospective jurors would report to the courthouse in groups of sixty and complete the questionnaires in person.<sup>98</sup> Despite this difference in procedure, the jury would remain anonymous as the parties and the court established previously.<sup>99</sup>

The parties would have the right to review the questionnaire after the Jury Administrator detached the last page and so long as the questionnaires remained in the courtroom.<sup>100</sup> The parties would receive two days to review the questionnaires from each group of sixty—without each questionnaire’s last page—and prepare for Judge Schwab’s rulings on any “for cause” dismissals, all of which Judge

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<sup>95</sup> See *id.*; United States v. Wecht (*Wecht II*), 537 F.3d 222, 225 (3d Cir. 2008). Given the intense local-media coverage at the time, it is hard to imagine that the media lacked notice of the jury-selection procedure in the first trial, especially because (1) the media was partially responsible for the delay in the first trial because of its appeal and (2) most of the disputes on appeal concerned First Amendment and common-law right-of-access issues. See generally United States v. Wecht (*Wecht I*), 484 F.3d 194 (3d Cir. 2007).

<sup>96</sup> See *Wecht II*, 537 F.3d at 225 (“grant[ing] a stay of the trial pending [the court’s] resolution of the various appeals”) (internal citations omitted); see also *Wecht I*, 484 F.3d 194.

<sup>97</sup> See United States v. Wecht, No. 2:06-cr-00026-AJS (order requiring empanelment of anonymous jury). The court needed to obtain a new venire because the initial venire was released based on an unrelated appeal. See *Wecht II*, 537 F.3d at 225. In selecting a new venire, Judge Schwab decided that adopting the same procedure and questionnaire without consulting the parties and the media was appropriate because “the Final Jury Questionnaire had already been approved, and the Jury Selection Procedure . . . had existed, *without objection, for more than sixteen (16) months.*” United States v. Wecht, No. 2:06-cr-00026-AJS (order requiring empanelment of anonymous jury).

<sup>98</sup> See United States v. Wecht, No. 2:06-cr-00026-AJS (order requiring empanelment of anonymous jury). Judge Schwab “consulted with other district judges and the Jury Administrator on the procedure.” *Id.*

<sup>99</sup> See *id.* Judge Schwab reviewed the venire process used in “other high profile cases” and concluded that the questionnaires and procedure should otherwise remain in accordance with the jury-selection plan to which the parties agreed in the first scheduled trial. *Id.*

<sup>100</sup> See *id.*

Schwab would make in open court and on the record.<sup>101</sup> Once at a pool of forty qualified jurors, only the parties would receive the last page of the questionnaire and thus know the names and addresses of the forty qualified jurors; the forty qualified jurors would remain anonymous to the public.<sup>102</sup> The parties would then have the opportunity to make additional motions to disqualify any jurors for cause and to make peremptory challenges.<sup>103</sup> This second round of “for cause” motions and peremptory challenges would also occur in open court.<sup>104</sup>

During jury selection, Judge Schwab would conduct all proceedings, including the “voir dire questioning of the final qualified pool of jurors,” in open court, but the media would not receive access to the questionnaires.<sup>105</sup> Instead, the media would receive access to the questionnaires only at the conclusion of trial.<sup>106</sup> Moreover, Judge Schwab would not allow the media to remove the questionnaires from the courtroom or view the last page containing the juror names and addresses.<sup>107</sup> Nonetheless, Judge Schwab would permit any juror who wanted to reveal his or her identity to do so at the conclusion of trial.<sup>108</sup>

Despite previously agreeing to juror anonymity in the first scheduled trial,<sup>109</sup> Wecht objected to the removal of the last page from the

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<sup>101</sup> *Id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See id.*

<sup>104</sup> United States v. Wecht, No. 2:06-cr-00026-AJS (order requiring empanelment of anonymous jury).

<sup>105</sup> *Id.*

<sup>106</sup> *See id.* This Comment does not assess whether Judge Schwab appropriately denied the media access to the questionnaires until the conclusion of trial. Instead, this Comment contends that Judge Schwab had the authority to deny the media access at least until the conclusion of jury selection.

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See id.* On appeal, the Third Circuit did not consider whether Wecht waived his right to a public trial by agreeing to juror anonymity and then failing to object in the first trial. Why the Third Circuit failed to consider this waiver issue is unclear. While the U.S. Court of Appeals for the Fifth Circuit permits waiver where the defendant fails to object, the U.S. Courts of Appeals for the Second and Seventh Circuits hold that a defendant cannot waive the right to a public trial under the Sixth Amendment unless clear evidence demonstrates that the defendant did so knowingly. *See* United States v. Hitt, 473 F.3d 146, 154–55 (5th Cir. 2006); Walton v. Briley, 361 F.3d 431, 433–34 (7th Cir. 2004); United States v. Canady, 126 F.3d 352, 359–60 (2d Cir. 1997). Where the Third Circuit stands on this circuit split is unclear. *Compare* United States v. Sorrentino, 175 F.2d 721, 723 (3d Cir. 1949) (holding that the

questionnaires in the second trial.<sup>110</sup> WPXI, Inc., PG Publishing Company, and Tribune Review Publishing Co. (collectively the “Media-Intervenors”) also filed a motion to challenge the order and requested that Judge Schwab make the names and addresses of the four hundred prospective jurors available.<sup>111</sup> In December 2007, Judge Schwab ruled that the initial order for an anonymous jury would stand.<sup>112</sup>

The Media-Intervenors appealed to the Third Circuit.<sup>113</sup> On January 9, 2008, the Third Circuit ordered Judge Schwab to disclose all four hundred prospective jurors’ names and addresses to the parties and the Media-Intervenors before empaneling the jury.<sup>114</sup> On August 1, 2008, the court issued its opinion.<sup>115</sup>

### B. *Majority Opinion*

The majority of the court held that the Media-Intervenors’ First Amendment right of access “requires disclosure of jurors’ names.”<sup>116</sup> After briefly reviewing the “right of access jurisprudence,” the court set out to apply the “experience and logic” test from *Press-Enterprise II* to determine whether the names and addresses of prospective jurors

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defendant’s failure to object either personally or via counsel to the court’s exclusion of all spectators except the press from the courtroom constituted a waiver of the right to a public trial), *with* United States *ex rel.* Bennett v. Rundle, 419 F.2d 599, 604–05 (3d Cir. 1969) (holding that the defendant did not waive the right to a public trial where the defendant’s attorney acquiesced to the clearing of the courtroom but told the court that the defendant might take issue later with the right to a public trial).

<sup>110</sup> See United States v. Wecht, No. 2:06-cr-00026-AJS (W.D. Penn. Dec. 21, 2007) (order requiring empanelment of anonymous jury). Wecht also moved for the voir dire of all four-hundred prospective jurors in open court. See *id.* By making this motion, Wecht wanted each prospective juror’s answer on the questionnaire repeated orally in court. See *id.*

<sup>111</sup> See *id.* The Media-Intervenors, like Wecht, requested that the voir dire either take place in person in open court or that all of the questionnaires be read in open court. See *id.*

<sup>112</sup> See United States v. Wecht (*Wecht II*), 537 F.3d 222, 225–26 (3d Cir. 2008); see generally United States v. Wecht, No. 2:06-cr-00026-AJS (order requiring empanelment of anonymous jury). Use of the term “anonymous jury” is a misnomer here because the jury is anonymous to all parties and the public until the venire is narrowed to forty prospective jurors. At this time, the jury is no longer anonymous to the parties because they receive the last page of the questionnaire. The jury, however, remains anonymous to the public throughout the remainder of the trial because the public never receives the last page of the questionnaire.

<sup>113</sup> See *Wecht II*, 537 F.3d at 226.

<sup>114</sup> See *id.* at 227.

<sup>115</sup> See *id.* at 222.

<sup>116</sup> *Id.* at 233.

“are subject to a presumptive right of public access under the First Amendment.”<sup>117</sup>

Under the experience prong, the majority concluded that “jurors’ names have traditionally been available to the public prior to the beginning of trial.”<sup>118</sup> The court observed that in *Press-Enterprise II*, the Supreme Court looked at over one-thousand years of history when employing the experience prong.<sup>119</sup> The court acknowledged that a tradition of concealing jurors’ names and addresses had developed over the past forty years in light of legislation by Congress.<sup>120</sup> Nonetheless, instead of factoring in the technological advances over the last forty years and their affect on how the media covers trials, the majority downplayed the significance of the last forty years relative to the last one thousand years by placing equal weight on all one thousand years.<sup>121</sup> The court found that small, local communities, where “most people have known each other,” have traditionally formed the pool from which the courts selected jurors.<sup>122</sup> The court asserted that when it combined this small-community dynamic with the tradition of open voir dire,<sup>123</sup> there is strong evidence that the public must have known the jurors’ identities.<sup>124</sup> Consequently, the majority determined that a strong tradition of openness and a weak tradition of anonymous juries existed historically.<sup>125</sup>

Under the logic prong, the majority concluded that “the benefits of public access” outweighed the risks associated with “public knowledge of jurors’ identities.”<sup>126</sup> Beginning with the risks, the court stated that the dangers of public access include attempts by others to

<sup>117</sup> *Id.* at 233–34.

<sup>118</sup> *Id.* at 237.

<sup>119</sup> *See Wecht II*, 537 F.3d at 236.

<sup>120</sup> *See id.* In this regard, the Court highlighted 28 U.S.C. § 1863(b)(7). *See id.* For more on 28 U.S.C. § 1863(b)(7), see *supra* Part II.A.

<sup>121</sup> *See Wecht II*, 537 F.3d at 237.

<sup>122</sup> *See id.* at 235.

<sup>123</sup> Some scholars have suggested that traditionally little opportunity existed to voir dire prospective jurors. *See* John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195, 217 (1981) (“[In the] eighteenth-century jury trial . . . the accused took the jury as he found it and virtually never employed his challenge rights. Indeed, at the Old Bailey only two 12-man jury panels were used to discharge the entire caseload of as many as a hundred felony trials in a few days. Each jury usually heard several unrelated cases before deliberating on any.”).

<sup>124</sup> *See Wecht II*, 537 F.3d at 235.

<sup>125</sup> *See id.* at 237.

<sup>126</sup> *Id.* at 238–39.

influence or threaten jurors, resistance by jurors against participating in high-profile trials to protect their privacy, and dishonesty by jurors during voir dire to prevent the “disclosure of embarrassing information.”<sup>127</sup> The court, however, rejected each risk because releasing the jurors’ names after trial would not eliminate the threat.<sup>128</sup> The majority contended that releasing the jurors’ names after the trial could still subject jurors to retaliation, generate privacy fears, and create anxiety about revealing sensitive information.<sup>129</sup>

Furthermore, the majority asserted that the public has the right to know who is exercising the power that decides “the fate of someone who [sic] the state has targeted for prosecution” because the “judicial system benefits from . . . public access.”<sup>130</sup> First, the court insisted that it only makes sense that the public know who is exercising this power given that the public has the right to attend voir dire proceedings and watch the trial, which is where the jurors use this power.<sup>131</sup> Second, the court maintained that knowing the identity of those exercising this power verifies juror impartiality to the public, roots out corruption and bias, and instills public confidence in the system.<sup>132</sup> Thus, the court asserted that public access has a democratic function in that it promotes public accountability.<sup>133</sup>

The majority suggested that if a district court judge is concerned about excessive media coverage, then that judge should make findings on a case-by-case basis to show a compelling government interest that would otherwise be impaired.<sup>134</sup> In this case, the court did not find any compelling government interest because Judge Schwab failed to make any findings on the matter.<sup>135</sup> As a result, the majority found that media access to the jurors’ names was crucial and the reasons to withhold the jurors’ names were not compelling enough to overcome the findings in favor of public access by empanelment.<sup>136</sup>

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<sup>127</sup> *Id.* at 238.

<sup>128</sup> *See id.* at 238, n.29.

<sup>129</sup> *See id.*

<sup>130</sup> *Wecht II*, 537 F.3d at 238.

<sup>131</sup> *See id.*

<sup>132</sup> *See id.* at 239.

<sup>133</sup> *See id.* at 238.

<sup>134</sup> *See id.* at 239. The Third Circuit did not provide examples of a compelling governmental interest.

<sup>135</sup> *See id.* at 239–42.

<sup>136</sup> *See Wecht II*, 537 F.3d at 239; *see also supra* note 88 and accompanying text (noting that the Third Circuit’s *stated* holding—that the right of access attaches by or no

Consequently, the court concluded that a First Amendment right of access attaches to prospective jurors' names and addresses.<sup>137</sup>

### C. *Dissenting Opinion*

In his dissent, Judge Van Antwerpen argued that the majority's application of the "experience and logic" test ignored "a substantial volume of case law, statutes passed by Congress, and the established practices of many of this country's courts."<sup>138</sup> Thus, the dissent reasoned that if the majority's precedent is allowed to endure, it "will undoubtedly cause significant problems and delays in our district courts."<sup>139</sup>

Under the experience prong, Judge Van Antwerpen concluded that access to jurors' names and addresses has not been traditionally available to the public and that the majority erred by failing to recognize the traditional discretion district courts have over jury-selection procedures.<sup>140</sup> The majority reached its conclusion that "the names of jurors must . . . have been common knowledge" merely because the voir dire proceeding was "traditionally open to the public."<sup>141</sup> Judge Van Antwerpen argued that while voir dire proceedings were traditionally open, the majority drew an incorrect inference when it concluded that juror names were also available to the public.<sup>142</sup>

Furthermore, the dissent maintained that the majority should have placed more emphasis on the recent traditions of judicial control that developed in response to the "increased media presence and

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later than empanelment—is incorrect because the majority implied that this right actually attaches, at least, during voir dire). The Third Circuit's opinion does not indicate that it considered remanding the case for factual findings. If the Third Circuit remanded for this purpose, then Judge Schwab could have made specific findings of fact to determine whether the government had a compelling interest that would support closure.

<sup>137</sup> See *id.*; see also *supra* note 88 and accompanying text.

<sup>138</sup> *Wecht II*, 527 F.3d at 243 (Van Antwerpen, J., dissenting).

<sup>139</sup> *Id.*

<sup>140</sup> See *id.* at 252.

<sup>141</sup> *Id.*

<sup>142</sup> See *id.* Judge Van Antwerpen and the majority do not discuss the possibility that a party could ask prospective jurors their names during voir dire, assuming that the trial judge would permit such a question. By doing so, the public would learn the names of the prospective jurors. Still, if the parties learned the prospective jurors' names before voir dire because they had a juror list, then nothing guarantees that every attorney would ask or use every prospective juror's name during voir dire to make all of the names available to the public. Moreover, juror addresses would not likely be a subject of discussion if the attorneys had the addresses prior to voir dire.

role in judicial proceedings.”<sup>143</sup> In particular, Judge Van Antwerpen highlighted the Supreme Court’s recognition of the pervasive modern media in *Sheppard* in 1966.<sup>144</sup> Judge Van Antwerpen contended that Congress passed the Jury Selection and Service Act of 1968<sup>145</sup> in response to *Sheppard* and thereby codified the inherent discretionary powers that courts traditionally exercised throughout the United States to limit “prejudicial influences.”<sup>146</sup> Finally, Judge Van Antwerpen noted that much of the case law since the 1960s recognizes the inherent power of district court judges to deny access to the names of prospective jurors.<sup>147</sup> Consequently, the dissent concluded that jurors’ names and addresses were not “historically known to the public.”<sup>148</sup>

Under the logic prong, the dissent concluded that the public disclosure of prospective jurors’ names before trial is not “significantly important to the public’s ability to oversee the jury selection process” and does not “ensure the judicial system functions fairly and effectively.”<sup>149</sup> Using a list of factors set out in the Third Circuit’s decision in *United States v. Smith*,<sup>150</sup> Judge Van Antwerpen argued that access to jurors’ names did not benefit the public before empanelment.<sup>151</sup> In fact, Judge Van Antwerpen contended that the public has

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<sup>143</sup> *Id.* at 255–56.

<sup>144</sup> *Wecht II*, 527 F.3d at 255 (Van Antwerpen, J., dissenting).

<sup>145</sup> Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. §§ 1861–1869 (2006)).

<sup>146</sup> *Wecht II*, 537 F.3d at 252–54 (Van Antwerpen, J., dissenting) (internal quotation marks omitted). Judge Van Antwerpen suggested that the legislative history relating to the passage of 28 U.S.C. § 1863(b)(7) supports the conclusion that a diversity of practices already existed regarding anonymous juries in 1968 and that Congress merely codified existing practice. *See id.* at 253. Moreover, Judge Van Antwerpen argued that judicial conferences in the 1960s and 1970s also found that anonymous juries were consistent with tradition. *See id.* at 253–54.

<sup>147</sup> *See id.* at 254–55.

<sup>148</sup> *Id.* at 256.

<sup>149</sup> *Id.* at 256–57.

<sup>150</sup> 123 F.3d 140 (3d Cir. 1997). These factors are (1) “promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system;” (2) “promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings;” (3) “providing a significant community therapeutic value as an outlet for community concern, hostility, and emotion;” (4) “serving as a check on corrupt practices by exposing the judicial process to public scrutiny;” (5) “enhancement of the performance of all involved;” and (6) “discouragement of perjury.” *Id.* at 146–47 (citations omitted).

<sup>151</sup> *See Wecht II*, 537 F.3d at 257–58 (Van Antwerpen, J., dissenting).

a stronger argument for access after trial because knowing the outcome allows the public to ascertain the success of the process more effectively.<sup>152</sup>

In addition, the dissent asserted that the “potential dangers of public access” are significant.<sup>153</sup> Judge Van Antwerpen observed that the courts permit public access to trials to promote the public interest, which Judge Van Antwerpen defined as “fair and orderly trials presided over by unbiased jurors.”<sup>154</sup> Yet the dissent further observed that excessive pretrial access paradoxically endangers this public interest.<sup>155</sup> Judge Van Antwerpen assumed that the media will use jurors’ names and addresses to write stories about these jurors.<sup>156</sup> This creates the danger that research will involve speaking to jurors, or at least their families and friends during pretrial.<sup>157</sup> Additionally, it creates the danger that the media will intrude upon prospective jurors’ privacy even though the government requires private citizens to serve on juries.<sup>158</sup> Of particular concern, friends and enemies of the defendant will be in a better position to “exert influence” over jurors.<sup>159</sup> Still, even in the absence of harassment, the media attention could make jurors less willing to serve and, if they serve, less willing to provide honest answers during voir dire.<sup>160</sup>

The dissent concluded that the negatives of pre-empanelment access outweigh the benefits that public access will provide the system. In particular, Judge Van Antwerpen contended that access to jurors’ names could tarnish the impartiality of the jury, add to the struggle of finding “an uninformed jury,” and make the jurors vulnerable to harassment.<sup>161</sup> Nonetheless, the dissent indicated that this balancing is difficult, and because it depends on the specifics of each case, the court should leave this determination to the judgment of district judges.<sup>162</sup>

<sup>152</sup> See *id.* at 258 n.63.

<sup>153</sup> *Id.* at 258.

<sup>154</sup> *Id.* at 258–59.

<sup>155</sup> See *id.*

<sup>156</sup> See *id.* at 258.

<sup>157</sup> See *Wecht II*, 537 F.3d at 258 (Van Antwerpen, J., dissenting).

<sup>158</sup> See *id.*

<sup>159</sup> *Id.*

<sup>160</sup> See *id.* at 257–58.

<sup>161</sup> *Id.* at 259.

<sup>162</sup> See *id.* at 259 nn.66–67. Judge Van Antwerpen argued that the majority stretched the case law to represent more than it really says because most of the ma-



The dissent pointed to *United States v. Black*<sup>163</sup> and *Gannett Co. v. State*<sup>164</sup> as two examples in which courts considered high-profile cases similar to *Wecht II* and drew the conclusion that the “experience and logic” test cannot support a First Amendment right of access to prospective jurors’ names and addresses before empanelment.<sup>165</sup> In both cases, the parties knew the jurors’ identities and conducted voir dire in open court, but the judge withheld the prospective jurors’ names from the media.<sup>166</sup> Judge Van Antwerpen highlighted that the court in each case did not find a historical tradition of public access to jurors’ names because neither court inferred such a right simply from the fact that courts traditionally drew jurors from small local communities.<sup>167</sup> Additionally, Judge Van Antwerpen alluded to the *Black* court’s argument that access to the voir dire process satisfies the First Amendment while access to jurors’ names created too many dangers to the proper functioning of the jury.<sup>168</sup> Supporting this argument, the dissent emphasized the *Gannett* court’s assertion that the connection between the goals of public access and knowledge of jurors’ names was weak.<sup>169</sup> Consequently, Judge Van Antwerpen concluded that *Black* and *Gannett*, though not binding, represent the approach the majority should have taken in *Wecht II*.<sup>170</sup>

#### IV. THE “EXPERIENCE AND LOGIC” TEST DOES NOT SUPPORT A FIRST AMENDMENT RIGHT OF ACCESS TO THE NAMES AND ADDRESSES OF PROSPECTIVE JURORS

Using the “experience and logic” test, the Third Circuit in *Wecht II* incorrectly held that the First Amendment provides the media with a right of access to the names and addresses of prospective jurors prior to empanelment. First, the Third Circuit failed to consider the

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jority’s support came from cases that arose from post-trial access concerns rather than pretrial access concerns. See *id.* at 259 n.66.

<sup>163</sup> 483 F. Supp. 2d 618 (N.D. Ill. 2007) (using the “experience and logic” test to hold that a newspaper did not have a First Amendment right of access to obtain jurors’ names during trial).

<sup>164</sup> 571 A.2d 735 (Del. 1990) (upholding lower court’s order to withhold prospective jurors’ names in a high-profile murder trial because no First Amendment right of access to jurors’ names exists).

<sup>165</sup> *Wecht II*, 537 F.3d at 259–60 (Van Antwerpen, J., dissenting).

<sup>166</sup> See *id.* at 260 (citing *Black*, 483 F. Supp. 2d at 620–21; *Gannett*, 571 A.2d at 737).

<sup>167</sup> See *id.* at 261 (citing *Black*, 483 F. Supp. 2d at 626; *Gannett*, 571 A.2d at 751).

<sup>168</sup> See *id.* at 260 (citing *Black*, 483 F. Supp. 2d at 628).

<sup>169</sup> See *id.* at 261 (citing *Gannett*, 571 A.2d at 751).

<sup>170</sup> See *id.* at 261–62.

federal common-law right of access before searching for a new constitutional right. Second, the Media-Intervenors sought access to information contained within the prospective jurors' questionnaires and not to the actual voir dire proceedings. It is not clear that the First Amendment right of access even applies to documents while the common-law right of access is clearly applicable.

Last, assuming that the First Amendment right of access does apply to documents, the Third Circuit nonetheless misapplied the "experience and logic" test. Under the experience prong, the court reviewed common-law traditions but failed to recognize that public knowledge of prospective jurors' names and addresses was historically a function of demographics, not a specific procedural guarantee. Additionally, the court completely ignored the country's statutory traditions, which suggest that the statutes only entitled the defendant, and thus the public, to the identity of prospective jurors in capital-offense trials. The court also overlooked recent trends that have resulted in greater judicial discretion over jury selection. Under the logic prong, the Third Circuit highlighted legitimate policy concerns that would arise if it did not recognize a right of access, focusing on the need to hold jurors accountable to the public. The court, however, failed to balance these concerns against the greater harm that extending the right of access to prospective jurors' identities could cause in high-profile trials—namely, diminished district court discretion over jury selection. Consequently, the Third Circuit should not have held that the media has a right of access under the First Amendment to the names and addresses of prospective jurors before empanelment.<sup>171</sup>

A. *The Third Circuit Should Have Decided Wecht II on Common-Law Right of Access Grounds, Not on First Amendment Grounds*

The Third Circuit, in the interest of constitutional avoidance, should have attempted to address the Media-Intervenors' access claims under the common-law right-of-access doctrine rather than creating a new constitutional right. In *Wecht II*, the court quickly recognized and disregarded the Media-Intervenors' argument that the public has a common-law right of access to the prospective jurors'

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<sup>171</sup> See *supra* note 88 and accompanying text (noting that the Third Circuit's *stated* holding—that the right of access attaches no later than empanelment—is incorrect because the majority implied that this right actually attaches, at least, during voir dire).

questionnaires.<sup>172</sup> Why the court ignored this common-law tradition is unclear and problematic.<sup>173</sup>

The decision to apply the “experience and logic” test in *Wecht II* presumes that the First Amendment right of access provides a public-access right to documents as well as to judicial proceedings. The Media-Intervenors did not request access to the voir dire proceedings given that the jury selection was to occur in open court.<sup>174</sup> Instead, the Media-Intervenors sought the names and addresses of the prospective jurors by requesting the full prospective-juror questionnaires, including the last page with the jurors’ names and addresses.<sup>175</sup>

When the Supreme Court created the “experience and logic” test, it relied on a series of cases establishing a First Amendment right of access to courtroom proceedings in criminal trials and, by extension, the proceedings surrounding the trial, such as voir dire.<sup>176</sup> The Supreme Court, however, has yet to extend its right-of-access jurisprudence under the First Amendment from proceedings to documents. While some courts have implied a right of access to court documents under the First Amendment, other courts have not followed suit.<sup>177</sup> If the First Amendment does not cover court documents, then the *Wecht II* court applied the wrong law.

At the same time, the Supreme Court has established a right to judicial documents and information under the federal common-law right-of-access doctrine.<sup>178</sup> Although the Supreme Court has not

<sup>172</sup> See *Wecht II*, 537 F.3d at 233 n.21.

<sup>173</sup> The court stated that the Media-Intervenors failed to develop this point in their brief. See *id.* at 233. For unknown reasons, the court did not ask the parties to develop their arguments on the common-law access question further.

<sup>174</sup> See *United States v. Wecht*, No. 2:06-cr-00026-AJS (W.D. Penn. Dec. 21, 2007) (order requiring empanelment of anonymous jury).

<sup>175</sup> See *id.*

<sup>176</sup> See generally *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986) (declaring right of access to preliminary hearings); *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984) (declaring right of access to voir dire); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (declaring right of access to criminal trials).

<sup>177</sup> Compare *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (permitting access to filed documents in a civil case because the First Amendment right of access to criminal trials should also apply to civil cases), with *United States v. McVeigh*, 119 F.3d 806 (10th Cir. 1997) (disallowing access on First Amendment grounds to filed document sealed by the court in a criminal proceeding), and *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 113 (2d Cir. 1984) (holding that the First Amendment does not guarantee access beyond the right to attend trials).

<sup>178</sup> See *Nixon v. Warner Commc’n, Inc.*, 435 U.S. 589, 597 (1978).

flushed out this common-law right in detail, the Court has held that the public has a common-law right “to inspect and copy public records and documents, including judicial records and documents.”<sup>179</sup> The purpose of this common-law right of access is to “monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system.”<sup>180</sup> This right is “not absolute,” but the Supreme Court has recognized that “[i]t is difficult to distill . . . or to identify all the factors to be weighed in determining whether access is appropriate.”<sup>181</sup> As a result, district courts should exercise their discretion “in light of the relevant facts and circumstances of the particular case.”<sup>182</sup>

The fact that the Third Circuit ignored the common-law right of access is puzzling and creates a quandary for district courts that rely upon judicial discretion to cope with high-profile trials. First, the Media-Intervenors sought the prospective jurors’ questionnaires, but the First Amendment right of access does not necessarily apply to documents, while the common-law right of access clearly does apply. Second, the Supreme Court places discretion squarely with the district courts, while the Third Circuit removes that discretion. Under the common-law right of access, district courts may restrict access because of prejudicial publicity before trial, third parties’ privacy interests, and impairments to the trial’s efficiency.<sup>183</sup> Moreover, because appellate courts review district courts’ rulings on the common-law right of access under an abuse-of-discretion standard, appellate review should pay great deference to lower courts’ rulings on common-law access issues.<sup>184</sup> By ignoring the Supreme Court’s and Congress’s obvious preference to honor district court discretion, the *Wecht II* decision creates questions as to how much power the district courts have to control the publicity inherent in high-profile trials.

*B. Misapplying the “Experience and Logic” Test in Wecht II*

Assuming that the First Amendment covers the Media-Intervenors’ request for documents—in this case the juror questionnaires—then the Third Circuit was correct to use the “experience

<sup>179</sup> *Id.* at 597–99.

<sup>180</sup> *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1303, 1308 (7th Cir. 1984).

<sup>181</sup> *Nixon*, 435 U.S. at 598–99.

<sup>182</sup> *Id.* at 599.

<sup>183</sup> *See, e.g.,* *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997); *United States v. Amodeo*, 71 F.3d 1044, 1047–50 (2d Cir. 1995).

<sup>184</sup> *See Nixon*, 435 U.S. at 599.

and logic” test in *Wecht II*, but the *Wecht II* decision did not apply the test correctly. Under the experience prong, the court failed both to unearth a history of public access concerning prospective jurors’ names and addresses and to consider this history based on the rise of modern media and communications technology.<sup>185</sup> Under the logic prong, the Court failed to properly account for the risks that public access poses both to prospective jurors and to the criminal-justice system in high-profile trials. If the Third Circuit properly accounted for these risks, the Court could not have claimed that disclosure of the prospective jurors’ names and addresses before empanelment would have a “*significant* positive role in the functioning of the [jury-selection] process.”<sup>186</sup> As a result, the balance of the experience and logic prongs weighs against a First Amendment right of access and, thus, against a constitutional presumption of access to prospective jurors’ names and addresses.<sup>187</sup>

<sup>185</sup> The court is not formally required to emphasize one part of history over another, but this Comment contends that the court should view all one thousand years in context by accounting for historical trends. See, e.g., Michael J. Hayes, Note, *What Ever Happened to “The Right to Know”?: Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111, 1131 (1987) (noting that a historical analysis is “inconsistent with the . . . established approach to first amendment [sic] adjudication” because interpreting the First Amendment “‘in light of current values and conditions’ . . . free[s] the Court from . . . historical assumption[s]”). For example, one thousand years ago, media coverage was less of a concern because jurors were self-informing fact finders chosen due to their possession of knowledge about the case. See John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 314 (1973). Yet the influence of the media has rightly occupied the courts’ attention over the last half-century because (1) the justice system today does not want jurors with prior knowledge of the case and (2) the pervasiveness of modern media coverage is likely to make the task of eliminating jurors with prior knowledge more difficult. Thus, while this Comment argues for greater focus on more recent traditions, it does not contend that the historical analysis of the experience prong lacks relevance in the right-of-access inquiry. But see, e.g., Wood, *supra* note 13, at 3–4 (“I find the Court’s reliance on history troubling for at least two reasons: First, I believe that the Court has given insufficient weight to the dramatic changes in the criminal judicial process since the drafting of the First Amendment—changes that make historical experience, divorced from its context, misleading rather than enlightening. Second, I fear that the Court’s heavy emphasis on history encourages a reliance on analogy at the expense of principled reasoning.”).

<sup>186</sup> *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (1986) (emphasis added).

<sup>187</sup> In discussing the First Amendment right of access in the following sections, this Comment assumes the right of access extends beyond attendance at proceedings to include access to documents and information. Nonetheless, whether the First Amendment right of access extends to documents and information is not a settled issue. See *supra* Part IV.A.

### 1. The Third Circuit Misapplied the Experience Prong

The experience prong requires that “the place and process have historically been open to the press and general public.”<sup>188</sup> While the *Wecht II* court found “public knowledge of jurors’ names” to be “a well-established part of American judicial tradition,”<sup>189</sup> the historical record proves otherwise. Public knowledge of jurors’ names and addresses was a function of community size rather than a procedure employed by the courts and designed to disclose jurors’ identities to the public.<sup>190</sup> When community sizes increased, the public lost its ability to recognize every juror because the community was too big for everyone to recognize everyone else.<sup>191</sup> Moreover, courts historically have lacked a procedure for disclosing jurors’ identities to the public if the identities were not available from the parties’ interactions with the prospective jurors during voir dire.<sup>192</sup> Thus, the historical record highlighted by the court would not yield public knowledge of jurors’ names and addresses today; an additional act would be necessary to identify the jurors if voir dire did not reveal their identities.<sup>193</sup> As a result, the traditional process of disclosing jurors’ identities was not a specific procedural guarantee but merely the coincidental and visual recognition of jurors by other members of the community during an open courtroom proceeding.

During the eighteenth century, American courts drew jurors from the small, local community where the crime occurred,<sup>194</sup> as was the tradition in England.<sup>195</sup> The venire was composed of white, property-owning men.<sup>196</sup> Thus, out of the small number of people living in a local community, even a smaller number were qualified to serve as

<sup>188</sup> *Press-Enterprise II*, 478 U.S. at 8.

<sup>189</sup> *United States v. Wecht (Wecht II)*, 537 F.3d 222, 236 (3d Cir. 2008).

<sup>190</sup> See *infra* notes 194–203 and accompanying text.

<sup>191</sup> See *infra* notes 201–03 and accompanying text.

<sup>192</sup> See *id.*

<sup>193</sup> See *infra* notes 204–07 and accompanying text.

<sup>194</sup> AMAR, *supra* note 67, at 88–93; Daniel D. Blinka, “*This Germ of Rottedness*”: *Federal Trials in the New Republic, 1789–1807*, 36 CREIGHTON L. REV. 135, 139 (2003); see ABRAMSON, *supra* note 20, at 22–36 (tracing the history of juries during the constitutional ratification period and the prevalence of debates on whether to maintain the tradition of drawing jurors from the local communities).

<sup>195</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES \*344.

<sup>196</sup> See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 878–82 (1994); see also ABRAMSON, *supra* note 20, at 29 nn.56–57 (noting that Vermont was the only exception to the property-ownership requirement when the Constitution was ratified in 1787).

jurors.<sup>197</sup> Because the spectators watched the voir dire proceedings,<sup>198</sup> “everybody knew everybody on the jury,” and all trial spectators, by virtue of the openness of the proceedings, could observe which jurors the parties chose and which jurors the court excused.<sup>199</sup>

The trial spectators, however, acquired knowledge of the prospective jurors’ identities merely by accident, not by right.<sup>200</sup> As the spectators watched the proceedings, they recognized individuals that they previously knew rather than acquiring the identity of each juror through some device in the proceeding or access to specific documents.<sup>201</sup> In other words, the procedural steps of jury selection never

<sup>197</sup> See Alschuler & Deiss, *supra* note 196, at 877. The property-ownership requirements reduced the number of qualified jurors by seventy-five percent in England. See *id.* While the effect of this requirement in the United States was far less prohibitive because of the availability of land, at least twenty-five percent of the male population was not qualified to sit on a jury. See *id.* When considering the fact that women, if assumed to make up fifty percent of the population, could not serve, then the combination reduced the number of qualified jurors to approximately thirty-eight percent of the population.

<sup>198</sup> See *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 506–08 (1984). In England, “[t]he indictment was . . . read; if the accused pleaded not guilty, the jurors were called forward, one by one, at which time the defendant was allowed to make his challenges.” *Id.* at 507 (citation omitted). As a result, “the entire trial proceeded ‘openly . . . , and as many [others] as be present may hear.’” *Id.* (citation omitted). The colonials transplanted this process of “[p]ublic jury selection” in the American Colonies, and thus, it “was the common practice in America when the Constitution was adopted.” *Id.* at 508.

<sup>199</sup> *In re Balt. Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988). Given that membership in the qualified juror population—being male and a property owner—required all the marks of privilege, such exclusivity also conceivably led to an individual’s prominence among the local citizenry. See Alschuler & Deiss, *supra* note 196, at 877; see also *supra* note 197 and accompanying text.

<sup>200</sup> Some sources indicate that after the defendant pleaded not guilty, prospective jurors were “called forward, one by one, at which time the defendant was allowed to make his challenges.” *Press-Enterprise I*, 464 U.S. at 507. This might indicate that the court called the jurors by name. Yet even if that is the case, this proves that juror names were used somewhere at some point, but it does not indicate how consistently most courts followed this process. See *supra* note 123 and accompanying text; see also *infra* note 202 and accompanying text. Additionally, the order of events suggests a problem with the process, which moves from calling forth the juror to exercising a challenge. A juror name, however, is not nearly enough information on which to exercise a challenge. Thus, either this recitation of the process is inaccurate or the prospective jurors’ identities were already known to those in the courtroom.

<sup>201</sup> See *In re Balt. Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988) (“[E]verybody knew everybody on the jury and we may take judicial notice that this is yet so in many rural communities throughout the country. So, everyone can see and know everyone who is stricken from a venire list or otherwise does not serve. Even in the case before us, the entire voir dire proceeding was in open court . . . . But the anonymity of life in the cities has so changed the complexion of this country that even the press . . . does

included a specific method designed to make the names public.<sup>202</sup> Instead, the public drew the conclusions themselves as a matter of coincidence. The likelihood that the public knew the jurors simply by recognizing people already known to them seems even more probable when considering the makeup of the juror pool—white men who owned property within a very small community.<sup>203</sup>

Importantly, the *Wecht II* majority, in its historical analysis, failed to distinguish between a tradition of making the jurors' names available by way of access to documentation and a tradition whereby the public simply recognized jurors by virtue of an open proceeding. As the court explained, juror anonymity used to be rare because "shielding their identity simply" was too difficult because community size precluded this possibility.<sup>204</sup> Although the size of the local community has changed,<sup>205</sup> the practice of open voir dire proceedings and the lack of a formal procedure for disclosing jurors' identities to the public have remained unchanged.<sup>206</sup> Thus, if this tradition of jury selection continued, then jurors' names would not be available without some further overt act by the court, which would not have been a part of a traditional court proceeding.<sup>207</sup>

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not know and cannot easily obtain the names of the jurors and of the veniremen and women who did not serve in this case.").

<sup>202</sup> For example, unlike the "medieval law . . . in the law books of the time," the actual records from the Old Bailey indicate that voir dire was rare in practice, which buttresses the assertion that there was little aside from coincidence that would allow the public to recognize the prospective jurors. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 275–76 (1978). In the Old Bailey, a single jury would routinely hear a series of cases and then deliberate on all of them at the same time. See *id.* at 275. Moreover, unlike the "ad hoc trial commissions," the defendants at the Old Bailey rarely exercised a challenge to prospective jurors. *Id.* The lackluster use of challenges makes sense because "in practice the prosecution and defense took the jury as they found it" and "no time was spent probing [prospective] jurors' backgrounds and attitudes." *Id.* at 279.

<sup>203</sup> See Alschuler & Deiss, *supra* note 196, at 878–82; see also ABRAMSON, *supra* note 20, at 29 nn.56–57.

<sup>204</sup> David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options* 70 TEMP. L. REV. 1, 30 (1997).

<sup>205</sup> See *In re Balt. Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1988).

<sup>206</sup> See *generally* *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501 (1984).

<sup>207</sup> Admittedly, some insignificant practices become so commonplace that they take on their own importance. Thus, historical accidents can take on constitutional significance. See Hayes, *supra* note 185, at 1132 ("[M]any criminal proceedings lack a common-law tradition of openness but have grown so in importance under modern practice that closing them defeats the purpose of allowing access to trials."). For example, public knowledge of trial jurors' identities ensures their accountability to the



Aside from common-law traditions, statutory traditions are also relevant. First, defendants, as distinguished from the media, have historically had a statutory right to know the jurors' names within certain limited contexts. For example, in both England and the United States, defendants had—and still have—a statutory right to know the names and addresses of the jurors in treason trials because the statute provided a right to the list of jurors prior to empanelment.<sup>208</sup> Given the political nature of treason prosecutions,<sup>209</sup> defendants should have the names of prospective jurors in voir dire for protection against government abuses. Although Congress specifically granted this right to defendants, Congress did not provide a right in the statute to the public. This is particularly significant given that the First Congress was responsible for passing this particular treason act as well as the First Amendment.<sup>210</sup> In fact, the First Congress debated and passed the First Amendment before the treason act.<sup>211</sup> As such, the First Amendment was a concept well understood by Congress at the

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public. *See infra* Part IV.B.2.b. Nonetheless, the analysis under the experience prong has to do with whether a practice has been available historically. The “experience and logic” test deals with questions about the importance of a practice under the logic prong. Hayes, *supra* note 185, at 1132 (noting that a “major problem with the history prong is that there is no logical link between the history factor and the first amendment rationale underlying the right of access”).

<sup>208</sup> *See* Act of Apr. 30, 1790, ch. 9 § 29, 1 Stat. 112, 118 (“[A]ny person who shall be accused and indicted of treason, shall have . . . a list of the jury . . . mentioning the names and place of abode of such . . . jurors, delivered unto him at least three entire days before he shall be tried for the same; and in other capital offences, shall have such copy of the indictment and list of the jury two entire days at least before the trial.”); Treason Act of 1708, 7 Ann., c. 21, §11 (Eng.) (“[W]hen any person is indicted for high treason, or misprision of treason, a list . . . of the jury, mentioning the names, profession, and place of abode of the . . . jurors, [shall] be . . . given . . . to the party indicated.”).

<sup>209</sup> *See, e.g.,* ABRAMSON, *supra* note 20, at 38–39 (discussing the politics surrounding Aaron Burr’s treason trial). President Thomas Jefferson and Aaron Burr were known to have held animosity for one another. *See id.* When Burr was on trial for treason during Jefferson’s presidency, “the federal marshal who summoned the grand jury had acted illegally by choosing substitutes at his own discretion for any persons excused; the proper procedure . . . was to choose from among the bystanders at court. . . . [Chief Justice John Marshall] agreed with Burr that the federal marshal’s procedure smacked of handpicking the grand jury.” *Id.*

<sup>210</sup> The First Congress sent the Bill of Rights to the states in September 1789. 1 JOURNAL OF THE SENATE OF THE UNITED STATES, 1st Cong., 1st Sess., 88–89 (Sept. 25, 1789) [hereinafter SENATE JOURNAL]. In April 1790, the First Congress passed the treason act. *See generally* Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112. The First Congress met from 1789 to 1790.

<sup>211</sup> *See* Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112; 1 SENATE JOURNAL, *supra* note 210, at 88–89.

time Congress passed the treason act.<sup>212</sup> If Congress wanted to imbue the public and, in particular, the press with a right to juror information based on the First Amendment, it certainly had ample opportunity to do so.

Second, the legislative history indicates that Congress codified existing judicial practices when it passed the Jury Selection and Service Act of 1968.<sup>213</sup> Congress expressly authorized the district courts to withhold prospective or actual jurors' names such that the jurors would remain anonymous to the public if "justice so requires."<sup>214</sup> If Congress was codifying existing practice, then public access to jurors' names was not part of a well-established tradition in high-profile cases.<sup>215</sup> In fact, as the Committee on the Operation of the Jury System made clear, the tradition might be one that favored judicial discretion to withhold jurors' names and addresses in cases that "attract unusual publicity."<sup>216</sup> By ignoring Congress's findings as to the historical records and reaching its own conflicting conclusions, the *Wecht II* majority comes close to encroaching upon a uniquely legislative function.

In addition to the long-term common-law and statutory traditions, the modern trend since the 1960s has been one of increasing judicial discretion in recognition of the "pervasiveness of modern communications."<sup>217</sup> Beginning after World War II, the potential effect of media coverage on a trial changed because of improved com-

<sup>212</sup> *Contra* Van Orden v. Perry, 545 U.S. 677, 726 n.27 (2005) (Stevens, J., dissenting) ("[L]eaders who have drafted and voted for a text are eminently capable of violating their own rules. . . . [Failing to recognize this] would misguidedly give authoritative weight to the fact that . . . Congress enacted the Alien and Sedition Act, which indisputably violated our present understanding of the First Amendment.").

<sup>213</sup> Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. §§ 1861-1869 (2006)); see also H.R. REP. NO. 90-1076, at 11 (1968), as reprinted in 1968 U.S.C.C.A.N. 1792, 1801.

<sup>214</sup> § 1863(b)(7). The statute does not suggest how long the courts may withhold the jurors' identities. Presumably, Congress intended that the courts interpret this timeframe's length. First, Congress codified existing practices, which suggests that Congress was permitting the practices already authorized by the courts. See H.R. REP. NO. 90-1076, at 11. Second, the statute permits the withholding of identities if justice so requires, which suggests that the courts make this determination on a case-by-case basis. § 1863(b)(7).

<sup>215</sup> The phrase "justice so requires" may be understood as being equivalent to the test for overcoming a First Amendment presumption of openness. More likely, however, it should be understood as being consistent with the common-law presumption of openness, which relies on a trial judge's discretion to overcome this presumption.

<sup>216</sup> FREE PRESS-FAIR TRIAL REPORT, *supra* note 4, at 409-12.

<sup>217</sup> Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

munications technology and the media's enhanced ability to reach a national audience.<sup>218</sup> By virtue of this shift, the "public" knowledge of jurors' identities took on a new meaning, changing from the small, local community to the national audience. The Supreme Court recognized this change and emphasized the importance of a trial judge's discretion in countering the invasiveness of the media.<sup>219</sup> Soon after the Supreme Court recognized the importance of trial-court discretion, Congress codified the existing discretionary powers of district judges.<sup>220</sup> Moreover, the courts have followed these rules ever since the 1960s.<sup>221</sup> Consequently, even if the existence of a tradition of public knowledge of jurors' names and addresses before the 1960s is questionable, a tradition of judicial discretion against such disclosure has clearly existed since then.<sup>222</sup> Thus, the increasingly national focus of television, radio, and new media, such as blogging, has augmented the dangers of public disclosure of jurors' identities.<sup>223</sup>

<sup>218</sup> See generally MICKELSON, *supra* note 13.

<sup>219</sup> See *Sheppard*, 384 U.S. at 358–63.

<sup>220</sup> See § 1863(b)(7).

<sup>221</sup> See, e.g., *United States v. Brown*, 250 F.3d 907 (5th Cir. 2001); *United States v. Wong*, 40 F.3d 1347 (2d Cir. 1994); *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988); *United States v. Doherty*, 675 F. Supp. 719 (D. Mass. 1987). But see, e.g., *Owens v. United States*, 483 F.3d 48 (1st Cir. 2007); *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990); *United States v. Mohammed*, 538 F. Supp. 2d 281 (D.D.C. 2008).

<sup>222</sup> See *Lawrence v. Texas*, 539 U.S. 558, 571–77 (2003) (indicating that modern trends are equally important when looking at our legal traditions). But see *Washington v. Glucksberg*, 521 U.S. 702, 710–28 (1997) (indicating that modern trends are not a part of our country's historical tradition).

<sup>223</sup> For some examples of the new dilemmas that trial courts face in light of advancing technologies, see Deirdra Funcheon, *Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies*, BROWARD-PALM BEACH NEW TIMES, Apr. 21, 2009, <http://www.browardpalmbeach.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies/www.wolfgangsvault.com> (discussing a mistrial resulting from eight out of twelve jurors using Google, some from home and some from cell phones, to conduct their own research on the defendants and the pharmaceutical medications discussed during trial); John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1, available at 2009 WLNR 5102471 (noting the recent phenomenon of jurors turning to Blackberries and iPhones to obtain information relevant to the case that was not actually presented or was expressly excluded from the jury).

## 2. The Third Circuit Misapplied the Logic Prong

The logic prong requires that public access play “a significant positive role in the functioning of the particular process.”<sup>224</sup> The court found that “the judicial system benefits from a presumption of public access to jurors’ names” prior to empanelment,<sup>225</sup> but a closer look at the policy justifications suggests that a blanket presumption of disclosure would create more harm than good.<sup>226</sup>

### a. Effect of the Presumption of Openness on Jurors and the Justice System

Prospective jurors and the criminal-justice system assume a combination of risks in high-profile trials when the public and the media can access their names and addresses. These risks include (1) the risk of intimidation, (2) the risk of invasion of privacy, and (3) the risk of media influence.

Access to jurors’ names in high-profile cases poses the risk that a friend or enemy of the defendant will intimidate the jurors or that the press will invade the jurors’ privacy. These are likely the two greatest fears prospective jurors have in high-profile cases.<sup>227</sup> Although the fear of intimidation is merely an unsubstantiated fear absent actual intimidation, public access to jurors’ names and addresses certainly creates the opportunity for intimidation and thus increases the risk that it will occur.<sup>228</sup> The Third Circuit argued that district

<sup>224</sup> *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8–9 (1986).

<sup>225</sup> *United States v. Wecht (Wecht II)*, 537 F.3d 222, 238 (3d Cir. 2008).

<sup>226</sup> The logic prong acts as a balancing test because courts weigh the benefits of public access against the risks of releasing prospective jurors’ identities. *See supra* Parts II.C, III.B. Importantly, however, this balancing does not result in an objective weighing of analogous interests. Instead, the interests on each side are “incommensurate.” *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring). This leaves courts with “no objective criteria for . . . comparing the interests at stake.” T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972 (1987). Thus, balancing requires that courts assign a value to the various interests and use these assigned values to compare and contrast. *See id.* at 972–73. Consequently, the logic prong can prove to be particularly difficult because subjectivity plays a role; that is, consistent outcomes from court to court depend upon each court assigning relatively similar values to each incommensurate interest.

<sup>227</sup> *See In re S.C. Press Ass’n*, 946 F.2d 1037 (4th Cir. 1991) (authorizing voir dire without the presence of the media where juror fears made honesty impossible with media present).

<sup>228</sup> Two types of cases are candidates for an anonymous jury: the organized-crime trial and the high-publicity trial. *See, e.g., United States v. Edwards*, 303 F.3d 606, 613 (5th Cir. 2002) (“[T]he paradigmatic situation justifying an anonymous jury is an or-

courts release the jurors' names at the end of trial anyway, and therefore, jurors will maintain these fears in anticipation of the information's release because defendant retaliation is possible after the trial.<sup>229</sup> The Third Circuit's analysis, however, is problematic. First, district courts would be ill-advised not to address jurors' fears before trial simply because jurors might cling to these fears after the trial concludes.<sup>230</sup> Second, the court failed to make the distinction between intimidation and retaliation.<sup>231</sup> A defendant who intimidates intends to affect the verdict, whereas a defendant who retaliates seeks to avenge a guilty verdict and not to influence the deliberation process. Naturally, most defendants would want to prevent a guilty verdict, and thus, the risk of intimidation is present to an extent with any defendant.<sup>232</sup> The defendant, however, must harbor an additional motivation beyond the desire for freedom—like revenge—for the defendant to seek retribution. In addition, why the court believed that the defendant would blame *prospective* jurors, whom the court did not empanel as *trial* jurors, for a guilty verdict is unclear. Thus, the likelihood of retaliation is not the same as compared to intimidation during trial.<sup>233</sup>

As for privacy fears, jurors manifest this fear during voir dire proceedings because prospective jurors want to guard their reputa-

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ganized crime trial, where the safety of the jurors becomes an overriding concern. This is not to say, however, that the withholding of juror information is appropriate only in organized crime cases. We have previously approved of an anonymous jury when the case attracts unusually large media attention and arouses deep passions in the community.” (citations omitted). The former clearly raises far more substantial safety issues than the latter. *See id.* at 613–14. Because this Comment is only concerned with high-profile trials, the remainder of this Comment does not focus on cases where juror safety is a legitimate concern.

<sup>229</sup> *See* United States v. Wecht (*Wecht II*), 537 F.3d 222, 238 n.29 (3d Cir. 2008).

<sup>230</sup> Arguably, district courts would amplify jurors' fears if the jurors understood that courts planned to do nothing at all.

<sup>231</sup> *See Wecht II*, 537 F.3d at 238.

<sup>232</sup> One tool that trial judges have at their disposal is sequestering the jury. This Comment, however, focuses on prospective jurors, not actual jurors. Thus, the more extreme action for a trial judge would be to sequester a pool of prospective jurors rather than just maintaining their anonymity until the actual jurors are selected and empaneled.

<sup>233</sup> Logically, prospective jurors do not have anything to fear, but people's motivations for fear are not always logical. As a result, prospective jurors may still fear retaliation or intimidation when arriving at the courthouse even though the likelihood of harm is low and the parties have not selected any of the actual trial jurors. Fear of intimidation, however, is usually less of an issue in high-profile trials that lay outside the organized-crime or gang trial context. *See supra* note 228 and accompanying text.

tions and prevent the release of any sensitive information.<sup>234</sup> Sometimes these privacy interests reach a point that warrants withholding jurors' names from the public to shield the jurors from embarrassment.<sup>235</sup> Critics of the anonymous jury argue that prospective jurors are more honest about their biases and experiences when jurors' names are public because of the jurors' concern for their reputations.<sup>236</sup> Yet jurors lie out of concern for their reputations.<sup>237</sup> By lying, jurors protect their reputations because the sensitive or embarrassing information remains private and undisclosed.<sup>238</sup> Again, the *Wecht II* court argued that when the district courts release the jurors' names after trial, the jurors' information will be public and jurors will fear this eventual release.<sup>239</sup> But far less interest in the trial will exist once the trial is over.<sup>240</sup> Television stations and newspapers are businesses that must turn a profit. Thus, these media outlets will respond to the decrease in public interest. By extension, far less interest in prospective jurors will exist after empanelment, which means that the media outlets will respond similarly. Consequently, the media is less likely to pursue investigations as vigorously and invade either the trial or

<sup>234</sup> See generally Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Jurors in Criminal Trials*, 49 VAND. L. REV. 123, 126–30 (1996) (discussing general sources of jurors' fears).

<sup>235</sup> See *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 512 (1984) (“[A] valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.”).

<sup>236</sup> See, e.g., *Owens v. United States*, 483 F.3d 48 (1st Cir. 2007).

<sup>237</sup> See Richard Seltzer et al., *Juror Honesty During the Voir Dire*, 19 J. CRIM. JUST. 451, 460 (1991) (stating that jurors in the study withheld information because they sought “to avoid embarrassment” and that “techniques such as pre-voir dire questionnaires or sequestering jurors for sensitive questions should lead to more truthful responses”). Lying is even more likely to occur when the juror is predisposed to reacting poorly to increased scrutiny. See Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1710 n.240 (2006) (citing Linda L. Marshall & Althea Smith, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire*, 120 J. PSYCHOL. 205, 213 (1985)).

<sup>238</sup> See generally Seltzer et al., *supra* note 237. Arguably, the information will become public anyway if the press is able to investigate. Yet this is only a deterrent if the individual juror believes that someone will catch him or her in a lie.

<sup>239</sup> See *United States v. Wecht (Wecht II)*, 537 F.3d 222, 238 n.29 (3d Cir. 2008).

<sup>240</sup> See *United States v. Doherty*, 675 F. Supp. 719, 725 (D. Mass. 1987) (permitting the withholding of the jurors' names from the public for seven days after the verdict was delivered because the decrease in media attention would adequately protect the jurors' privacy).

prospective jurors' privacy as persistently after the trial or empanelment, respectively.<sup>241</sup>

Last, the risk that the media will contact or attempt to contact prospective jurors in high-profile cases is high. The likelihood of its occurrence surely must increase dramatically in situations where the district judge empanels an anonymous jury, the media challenges the jurors' anonymity, and then the media requests the jurors' names and addresses.<sup>242</sup> While the media might be more inclined to investigate the jurors' backgrounds after requesting only their names, the prospect of the media both investigating and contacting the prospective jurors dramatically increases when the media also requests the prospective jurors' home addresses. District judges usually ask that prospective jurors avoid contact with the media because such contacts can result in the disclosure of information that the jurors should not hear, including the various opinions in the press.<sup>243</sup> Either result can corrupt prospective jurors, which is problematic because it depletes the size of the venire and affects the justice system's efficiency if the court must obtain a new venire panel. Additionally, the risk that the media will contact prospective jurors can heighten jurors' fears. For instance, it can increase juror anxiety where a juror might already have concerns about privacy and intimidation.<sup>244</sup> The increased anxiety can pressure a juror into taking a position without listening to the evidence.<sup>245</sup> Some empirical studies have confirmed that increased media scrutiny and exposure to views expressed in the press

<sup>241</sup> This has certainly been the approach of some district courts. *See id.* But the key phrase is "less likely." Some cases will inevitably result in continued investigations and privacy invasions by the media of actual trial jurors following a verdict or of prospective jurors following empanelment.

<sup>242</sup> *See, e.g.,* United States v. Brown, 250 F.3d 907, 920 n.20 (5th Cir. 2001) (stating that the media "is really complaining about . . . the enhanced difficulty of contacting former jurors to interview them").

<sup>243</sup> A natural response is to suggest that the judge ban any contact between the jury and media. But this assumes that both the jurors and the members of the press corps will comply with the order. *See, e.g.,* Marshall v. United States, 360 U.S. 310, 311–13 (1959) (describing how jurors sought out news articles on the defendant's prior convictions despite instructions from the trial judge to the contrary).

<sup>244</sup> *See generally* King, *supra* note 234.

<sup>245</sup> *See, e.g.,* United States v. Barnes, 604 F.2d 121, 141 (2d Cir. 1979) ("If 'the anonymous juror feels less pressure' as the result of anonymity, this is as it should be—a factor contributing to his impartiality.") (citation omitted).

can pressure jurors.<sup>246</sup> The result is a tendency amongst non-anonymous juries to conform their decisions to the public's views.<sup>247</sup>

When district courts are unable to address the effect of high-profile cases on individual jurors at the early stage of jury selection, the criminal-justice system suffers. For example, juror fears of intimidation and privacy invasions, regardless of their credibility, are a legitimate concern for the justice system because citizens might be less willing to serve as jurors.<sup>248</sup> Additionally, when jurors are subject to media influence—in particular media contact—the jurors are often no longer capable of serving on the jury as a result.<sup>249</sup>

b. Effects of Anonymity and Jurors' Obligations to the Public

The most important policy consideration weighing against juror anonymity and in favor of public access to prospective jurors' names is that the jurors exercise a government power, which requires accountability to the public, not just the parties. Emphasizing how the jurors exercise a government power, scholars have called the jury the "lower judiciary bench."<sup>250</sup> Opponents contend that the country's democratic values support a right of public access because allowing the exercise of such power by unknown persons in secret is not within

<sup>246</sup> See generally Philip E. Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model*, 25 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 331 (1992).

<sup>247</sup> See *id.* at 341. Some might argue it is not always bad for trial jurors to conform their views to the public's views. Although this can be true, the public is unlikely to be equally as informed as are the trial jurors who must sit through all of the testimony, cross-examinations, and evidence presentations. Most members of the public do not necessarily form their opinion based on such a comprehensive amount of information or swear to act according to the law and facts.

<sup>248</sup> See, e.g., JURY PRACTICES AND PROCEDURES COMM., ARIZ. SUPREME COURT AD HOC COMM., SUPPLEMENTAL REPORT CONCERNING JUROR ANONYMITY 2 (2003), available at <http://www.supreme.state.az.us/jury/SupRptJuryAnon.pdf> ("Offering anonymity is a small gesture that may make the jury experience more comfortable for many who would otherwise ignore or resent being called to serve.").

<sup>249</sup> For the effect of pretrial publicity on jurors, see Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677 (2000); Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law and Common Sense*, 3 PSYCHOL. PUB. POL'Y & L. 428 (1997).

<sup>250</sup> See, e.g., JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 218 (1814) (comparing the jury, as the lower house relative to the judge, to the House of Representatives, as the lower house relative to the Senate).



the makeup of a democracy.<sup>251</sup> Accountability, the argument goes, occurs when the public is in a position to scrutinize the jurors and ensure that no conflicts of interest, biases, misconduct, or corruption exist. When this occurs, accountability yields greater reliability in the verdict itself.<sup>252</sup> In other words, it ensures actual fairness, the “appearance of fairness,” and “public confidence in the system.”<sup>253</sup>

Although jurors must be accountable to the public, jurors are not accountable to the public in the same way as judges and elected officials. Either voters elect public officials or elected officials appoint other public officials—as is the case with federal judges—which instills a democratic element of control over the process for elected and appointed officials. Thus, anonymity would be inconsistent with this democratic element of control. On the other hand, the justice

<sup>251</sup> See Ephraim Margolin & Gerald F. Uelman, *The Anonymous Jury: Jury Tampering by Another Name?*, CRIM. JUST., Fall 1994, at 14, 15–16 (arguing that the American jury trial has been public from its beginnings); see also *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 507–09 (1984) (“[T]he entire trial proceeded openly . . . . This open process gave assurance to those not attending trials that others were able to observe the proceedings and enhanced public confidence. . . . Proceedings held in secret would deny th[e] [public an] outlet [for concern, outrage, and hostility] and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.”) (internal citations and quotation marks omitted); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”); *In re Balt. Sun Co.*, 841 F.2d 74, 76 (4th Cir. 1988) (“[T]he risk of loss of confidence of the public in the judicial process is too great to permit a criminal defendant to be tried by a jury whose members may maintain anonymity.”).

<sup>252</sup> See, e.g., *Richmond Newspapers*, 448 U.S. at 570–72.

The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

...  
 . . . A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society’s criminal process “satisfy the appearance of justice,” and the appearance of justice can best be provided by allowing people to observe it.

*Id.* (internal citations omitted).

<sup>253</sup> *Press-Enterprise I*, 464 U.S. at 508.

system functions best when it insulates jurors from outside pressures,<sup>254</sup> whether these pressures come from the public or the government.<sup>255</sup> Joseph Story insisted,

The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter,<sup>256</sup> than the former.

Story contended that the jury trial protected defendants from the government and the public because the jury was impartial.<sup>257</sup> Occasionally, anonymity is required because it “promotes impartial decision making.”<sup>258</sup> Unlike public officials, jurors obtain their power at random, and when jurors give up their power, they “inconspicuously fade back into the community.”<sup>259</sup> In this regard, “anonymity would

<sup>254</sup> History supports this concept. Jurors may hold their deliberations in secret. *See generally* Shaftesbury’s Trial, (1681) 8 Howell’s St. Tr. 759 (K.B.) (Eng.). Jurors are immune from prosecution based simply on the outcome of the verdict. *See generally* Bushell’s Case, (1670) 124 Eng. Rep. 1006 (K.B.). Jurors may even express dissatisfaction with the law under which the state indicts the defendant through jury nullification. *See generally* The Trial of John Peter Zenger, (1735) 17 Howell’s St. Tr. 676 (N.Y.) (Colonial Am.).

<sup>255</sup> *See* TAYLOR, *supra* note 250, at 219 (“It is evidently of equal or superior importance to life, liberty, and property, that juries should be independent of kings, presidents, factions, and demagogues . . . . Judges were made independent of the crown in England, because judgements were made instruments of tyranny. Verdicts of juries may become such instruments. A president can select juries of his own faction, by his officer, the marshal, and infallibly mould political verdicts.”). Critics might contend that because verdicts may become instruments of tyranny, the public needs to know who sits on the jury. This is a good reason to know the trial jurors’ identities, but it generally does not support the proposition that the public should know the prospective jurors’ identities because prospective jurors have nothing to do with the verdict. At the same time, critics may still point out that disclosure of prospective jurors’ identities is important because disclosure allows an observer to determine whether the parties fairly selected the trial jury or whether anyone collaborated with the prospective jurors to ensure that the trial jurors were preordained.

<sup>256</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1774, at 653 (Fred B. Rothman & Co. 1991) (1833).

<sup>257</sup> *See id.* (“The appeal for safety can, under such circumstances, scarcely be made by innocence in any other manner, than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right, and guided solely by legal evidence and a sense of duty.”).

<sup>258</sup> *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir. 1988).

<sup>259</sup> *Id.* Jury selection is not entirely random because the parties choose the trial jurors. Thus, one reason to know the prospective jurors is to ensure that the venire panel is random in the first place and not skewed by the government. Yet this is why this Comment advocates that the parties continue to receive the prospective jurors’ identities.

seem entirely consistent with, rather than anathema to, the jury concept.”<sup>260</sup>

As previously mentioned, opponents of the anonymous jury contend that juror accountability to the public addresses concerns over conflicts of interest, biases, misconduct, or corruption. Yet voir dire, where only the judge and the parties know the prospective jurors’ identities, addresses these concerns and is consistently available as a tool for the parties to root out bias, corruption, and other disqualifying information.<sup>261</sup> On the other hand, relying on the media to scrutinize the jurors for problems is speculative at best. Reliance on the media assumes that the media will conduct an investigation into the jurors’ backgrounds, that the media’s investigations will be thorough, and that the discovered information actually affects whether each juror remains on the jury. The court and the parties cannot ensure that the media will conduct these inquiries consistently from trial to trial or that the information will affect the jury’s makeup. Clearly, any post-trial investigation is a valuable source of information for many reasons, including gaining insight into the jury’s deliberative process and trying to uncover corruption or misconduct, which is much easier once the investigator knows how the jurors voted. Nevertheless, if the voir dire process has a flaw because the parties are unable to conduct a proper investigation, then the system should not rely on the media to fix the flaw. Instead, the system should fix the flaw.

Finally, while accountability is an important issue, only trial jurors must account to the public for the verdict.<sup>262</sup> After all, only trial jurors cast a vote during jury deliberations, which result in the verdict. Prospective jurors, however, are just that—prospective. In this regard, timing is crucial to the accountability issue. The balance between risks to the juror and accountability to the public is a matter of timing. Accountability is most central after the trial because, with the verdict in hand, the public has a right to know whether the verdict is

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<sup>260</sup> *Id.*

<sup>261</sup> See *Mu’Min v. Virginia*, 500 U.S. 415, 431 (1991) (suggesting that the purpose of voir dire is to select an impartial jury). After all, under the scenario for which this Comment advocates, the parties have access to the prospective jurors’ identities and, thus, are in a position to investigate.

<sup>262</sup> Arguably, prospective jurors are accountable, though to a lesser extent, because they have an obligation not to engage in juror misconduct. In this regard, prospective jurors have an obligation not to take themselves out of contention to be on the jury by, for example, accepting a payoff so that someone can shape the actual trial jurors by eliminating undesirable prospective jurors.

reliable. Juror risk, however, is vitally important before the trial because, if the court were to release prospective jurors' names to the media, the court would place all of the risks of a trial juror on a prospective juror without knowing whether the prospective juror would have any say in the verdict.

*C. Effect of Wecht II upon Judicial Discretion*

By requiring that trial judges disclose the names of the prospective jurors, *Wecht II* not only imposes a heavier burden on district court judges who choose to keep prospective jurors anonymous up to empanelment in high-profile trials, it also violates the Supreme Court's and Congress's clear preference that district court judges control the jury-selection process.<sup>263</sup>

By extending the First Amendment right of access to prospective jurors' names and addresses before empanelment, *Wecht II* imposes a much heavier burden on district court judges than the case law has previously imposed. Under the First Amendment, district court judges must overcome an "overriding interest" and closure must be "narrowly tailored to serve that interest."<sup>264</sup> Under the common-law right of access, however, district court judges are not subject to this heightened burden. Instead of "overriding interests,"<sup>265</sup> district court judges must overcome "countervailing interests."<sup>266</sup> Additionally, while the interests at stake under the First Amendment must be "narrowly tailored,"<sup>267</sup> courts must merely balance the interests at stake under the common law, which allows closure if the "countervailing interests heavily outweigh the public interests in access."<sup>268</sup> Although the exact definition of these interests is far from clear, courts agree that the burden of showing "countervailing interests" under the common law is far easier to meet than the burden of showing "overriding interests" under the First Amendment.<sup>269</sup>

<sup>263</sup> See *supra* Part IV.B.1.

<sup>264</sup> *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984).

<sup>265</sup> *Id.*

<sup>266</sup> *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988).

<sup>267</sup> *Press-Enterprise I*, 464 U.S. at 510.

<sup>268</sup> *Rushford*, 846 F.2d at 253.

<sup>269</sup> *Id.* ("The common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment."); see also *In re Wash. Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) ("The common law does not afford as much substantive protection to the interests of the press and public as the First Amendment does.").

In addition to requiring that district court judges meet a higher burden to keep prospective jurors anonymous prior to empanelment, *Wecht II* also applies the First Amendment's heightened standard of review. Under the First Amendment, many of the circuits require that district court judges jump through a number of procedural hoops to achieve closure.<sup>270</sup> The Supreme Court also requires that district court judges make specific findings of fact supporting closure, provide reasons for denying alternatives to closure, and ensure all of this is on the record so that the reviewing court can determine whether the ruling was appropriate.<sup>271</sup> All of this suggests that a district court ruling regarding anonymous prospective jurors is reviewed de novo under the First Amendment. By comparison, the Supreme Court has stated that closure orders made under the common-law right of access are reviewed for abuse of discretion.<sup>272</sup> Thus, *Wecht II* takes the ability to assess the on-the-ground facts away from district court judges and places this discretion with reviewing courts.

Consequently, *Wecht II* heightens the district court's burden when it attempts to keep prospective jurors' names and addresses from the media in high-profile trials while simultaneously placing control over prospective jurors' names and addresses with the reviewing courts rather than with the trial courts. Significantly, this shift of discretionary powers over the jury-selection process from the trial courts to the appellate courts effectively violates long-standing judicial and congressional policy.<sup>273</sup>

The Supreme Court bestowed control over jury selection upon district court judges decades ago. Since *Sheppard*, the Supreme Court has upheld and promoted the district courts' use of their discretionary powers to combat invasive media coverage in high-profile trials. For example, in *Rosales-Lopez v. United States*, the Supreme Court

<sup>270</sup> See, e.g., *In re Knight Publ'g Co.*, 743 F.2d 231, 234–35 (4th Cir. 1984) (stating that closure motions in a criminal proceeding require public notice and advanced docketing “to give the public and press an opportunity to intervene . . . , reasonable steps” to allow participation when the court knows “of the desire of specific members of the public to be present,” and an opportunity for interested parties “to object to the request”).

<sup>271</sup> See *Press-Enterprise I*, 464 U.S. at 510–11.

<sup>272</sup> See *Nixon v. Warner Commc'n, Inc.*, 435 U.S. 589, 599 (1978).

<sup>273</sup> Supporting the historical underpinning of judicial discretion, several state and federal courts have had specific rules permitting juror anonymity for some time. See *Gannett Co. v. State*, 571 A.2d 735, 746 & n.14 (Del. 1989) (citing *United States v. Breese*, 172 F. 765, 768 (W.D.N.C. 1909); *State v. Felts*, 133 F. 85, 92 (C.C.W.D. Va. 1904); *United States v. Antz*, 16 F. 119, 125 (C.C.E.D. La. 1883)).

stated, "Because the obligation to impanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*."<sup>274</sup> Additionally, the Supreme Court has held that trial-court rulings relating to the common-law right of access are reviewed for abuse of discretion, which suggests great deference to trial court discretion on right-of-access issues.<sup>275</sup> Even before *Sheppard*, federal courts boldly asserted that trial courts have vast discretion with which to control voir dire, including when the court releases prospective jurors' names to the parties and the public.<sup>276</sup> This discretion over the conduct of voir dire rightly includes whether voir dire should occur with or without public knowledge of the prospective jurors' identities.

Congress has also supported expanded discretionary powers for district judges by allowing them to determine when prospective jurors' names should be public.<sup>277</sup> With *Wecht II*, the Third Circuit creates doubt as to what discretionary power district judges now have to control the release of prospective jurors' names in high-profile trials, especially regarding what burden judges must overcome to restrict release. By finding that the media has a presumptive First Amendment right of access to the prospective jurors' names and addresses, the Third Circuit adds to the difficulty of district judges already burdened by the problems generally associated with high-profile trials and the responsibility for ensuring a fair and impartial jury.

## V. CONCLUSION

The *Wecht II* decision fails to recognize that "today's high visibility trials" put pretrial publicity "at another order of magnitude" than the courts have experienced historically.<sup>278</sup> Now more than ever, dis-

<sup>274</sup> 451 U.S. 182, 189 (1981).

<sup>275</sup> See *Nixon*, 435 U.S. at 599.

<sup>276</sup> See *United States v. Van Duzee*, 140 U.S. 169, 173 (1891) (holding that trial courts have the discretion to determine when to release the jury lists in noncapital-offense trials); see also *Pointer v. United States*, 151 U.S. 396, 407 (1894); *United States v. Wilson*, 104 F.2d 81, 82 (5th Cir. 1939); *Hendrikson v. United States*, 249 F. 34, 35-36 (4th Cir. 1918); *Shelp v. United States*, 81 F. 694, 696-97 (9th Cir. 1897).

<sup>277</sup> See generally *supra* Part II.A. See also 18 U.S.C. § 3432 (2006); 28 U.S.C. § 1863(b)(7) (2006); FED. R. CRIM. P. 24(a).

<sup>278</sup> Valerie P. Hans, *The Twenty-First Century Jury: Worst of Times or Best of Times?*, CRIM. L. BRIEF, Spring 2006, at 3, 4, available at <http://www.wcl.american.edu/>

strict courts need the discretion to determine how best to approach the complex aspects of pretrial media coverage.<sup>279</sup> *Wecht II* denies district courts one important approach—control over the timing of the release of prospective jurors’ identities to the public.

In creating a new constitutional right under the First Amendment to obtain the names and addresses of prospective jurors before empanelment, the Third Circuit ignores common-law traditions, previous determinations by the Supreme Court, and previous enactments by Congress. Additionally, the Third Circuit disregards the risks to prospective jurors and the judicial system, in favor of an unsubstantiated claim that the public needs the prospective jurors’ identities to ensure a fair process. Not only is the notion of public accountability difficult to substantiate with respect to jurors that have yet to render a verdict for which they must be accountable, the idea that prospective jurors must also be accountable for a verdict that they may never render is illogical. The Third Circuit favors public accountability at the beginning of the trial process because disclosure will bring fairness to the process. But the Third Circuit never substantiates its fundamental premise that disclosure of prospective jurors’ identities to the media actually and positively influences prospective jurors’ impartiality.

What matters in jury selection is whether the jurors are impartial and represent the diverse cross-section of American society as it exists within the particular community; their names and addresses are irrelevant when the parties are informed and voir dire is available. It is no accident that the U.S. Post Office released its “Jury Duty” stamp in 2007 with twelve faceless, diverse jurors pictured.<sup>280</sup> “Stamps, at their best, can remind a nation . . . what values its citizens hold most sacred.”<sup>281</sup> The justice system relies on “faceless” jurors, representing

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journal/clb/documents/Spring2006TheTwenty-FirstCenturyJuror-TheWorstofTimes orTheBestofTimes-byProfessorValerie\_000.pdf?rd=1.

<sup>279</sup> In the trial of Martha Stewart for securities law violations, the district court judge, deciding that the media coverage could bias the jury before it was selected, closed the voir dire proceedings to the press. See *ABC, Inc. v. Stewart*, 360 F.3d 90, 96 (2d Cir. 2004). The court order would provide the public with a transcript the following day. See *id.* at 95. While the Second Circuit held that the trial judge lacked a compelling justification for closing the proceedings, the Second Circuit stated that it did “not see why simply concealing the identities of the prospective jurors would not have been sufficient.” *Id.* at 104, 106. Yet the Third Circuit, in *Wecht II*, would deny the trial court the discretion to consider this option.

<sup>280</sup> Debra Cassens Weiss, *Stamp of Approval for Jury Service*, A.B.A. J., Sept. 5, 2007, [http://www.abajournal.com/news/stamp\\_of\\_approval\\_for\\_jury\\_service/](http://www.abajournal.com/news/stamp_of_approval_for_jury_service/).

<sup>281</sup> *Id.* (internal quotations omitted).

the community's interests, to appear in open court, fulfill their service requirement, and, just as quickly, disappear from the public stage.